DOCKET

No. 13-7451

Title:	John L. Yates, Petitioner
	v.
	United States
Docketed:	November 20, 2013
Lower Ct:	United States Court of Appeals for the Eleventh Circuit
Case Nos.:	(11-16093)
Decision Date:	August 16, 2013

Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Nov 13 2013	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due December 20, 2013)
Nov 26 2013	Waiver of right of respondent United States to respond filed.
Dec 5 2013	DISTRIBUTED for Conference of January 10, 2014.
Jan 6 2014	Response Requested . (Due February 5, 2014)
Jan 28 2014	Order extending time to file response to petition to and including March 7, 2014.
Feb 5 2014	Brief amicus curiae of Cause of Action filed.
Feb 5 2014	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Mar 5 2014	Order further extending time to file response to petition to and including March 14, 2014.
Mar 14 2014	Brief of respondent United States in opposition filed.
Mar 28 2014	Reply of petitioner John L. Yates filed.
Apr 3 2014	DISTRIBUTED for Conference of April 18, 2014.
Apr 21 2014	DISTRIBUTED for Conference of April 25, 2014.
Apr 28 2014	Motion to proceed in forma pauperis Granted. Petition for a writ of certiorari GRANTED limited to Question 1 presented by the petition.
May 15 2014	The time to file the joint appendix and petitioner's brief on the merits is extended to and including June 30, 2014.
May 15 2014	The time to file respondent's brief on the merits is extended to and including August 19, 2014.
May 28 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Jun 30 2014	Joint appendix filed. (Statement of costs filed.)
Jun 30 2014	Brief of petitioner John L. Yates filed.
Jul 3 2014	Brief amici curiae of Chamber of Commerce of the United States of America & National Association of Manufacturers filed.
Jul 7 2014	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.

Jul 7 2014	Brief amici curiae of Eighteen Criminal Law Professors filed.
Jul 7 2014	Brief amicus curiae of Cato Institute filed.
Jul 7 2014	Brief amicus curiae of Washington Legal Foundation filed.
Jul 7 2014	Brief amici curiae of Cause of Action, et al. filed.
Jul 7 2014	Brief amicus curiae of National Federation of Independent Business Small Business Legal Center filed.
Jul 7 2014	Brief amicus curiae of The Honorable Michael Oxley filed.
Jul 7 2014	Brief amici curiae of Pacific Legal Foundation, et al. filed.
Aug 19 2014	Brief of respondent United States filed.
Sep 4 2014	SET FOR ARGUMENT on Wednesday, November 5, 2014.
Sep 8 2014	Record requested from U.S.C.A. 11th Circuit.
Sep 8 2014	Record received from U.S.C.A 11th Circuit is electronic and located on PACER.
Sep 18 2014	Reply of petitioner John L. Yates filed. (Distributed)
Sep 19 2014	CIRCULATED
Nov 5 2014	Argued. For petitioner: John L. Badalamenti, Assistant Federal Defender, Tampa, Fla. For respondent: Roman Martinez, Assistant to the Solicitor General, Department of Justice, Washington, D. C.
Nov 5 2014	Letter from the Solicitor General filed. (Distributed)
Feb 25 2015	Judgment REVERSED and case REMANDED. Ginsburg, J., announced the judgment of the Court and delivered an opinion, in which Roberts, C. J., and Breyer and Sotomayor, JJ., joined. Alito, J., filed an opinion concurring in the judgment. Kagan, J., filed a dissenting opinion, in which Scalia, Kennedy, and Thomas, JJ., joined.

PETITION FOR WRIT OF CERTIORARI

ORIGINAL

13-7451

IN THE

Supreme Court of the United States

OCTOBER TERM, 2013

JOHN L. YATES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Supreme Court, U.S.
FILED
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MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, JOHN L. YATES, asks leave to file the enclosed Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit without prepayment of costs and to proceed in forma pauperis in accordance with Supreme Court Rule 39, and 18 U.S.C. § 3006A(d)(6). The filing of this petition is a continuation of the representation of the defendant under a Criminal Justice Act appointment of the Office of the Federal Public Defender for the Middle District of Florida by the United

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States District Court. In accordance with 18 U.S.C. § 3006A(d)(6), no affidavit as required by Supreme Court Rule 39, need be filed.

WHEREFORE, Petitioner, John L. Yates, asks leave to proceed in forma pauperis.

DATED this 13th day of October, 2013.

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13-7451

ORIGINAL

IN THE

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OCTOBER TERM 2013

JOHN L. YATES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

QUESTION 1: In the wake of the criminal charges filed against Enron's corporate officers, Congress passed the Sarbanes-Oxley Act of 2002. Known as the "anti-shredding provision" of the Act, 18 U.S.C. § 1519 makes it a crime for anyone who "knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, ***or tangible object*** with the intent to impede or obstruct an investigation. 18 U.S.C. § 1519 (emphasis supplied). John L. Yates, a commercial fisherman, was charged and convicted under this anti-shredding criminal statute for destroying purportedly undersized, harvested fish from the Gulf of Mexico after a federally-deputized officer had issued him a civil citation and instructed him to bring them back to port.

This petition presents the important question of whether the reach of section 1519 extends to the destruction of anything meeting the dictionary definition of "tangible objects," or instead is limited to the destruction of tangible objects related to record-keeping as follows:

> Whether Mr. Yates was deprived of fair notice that destruction of fish would fall within the purview of 18 U.S.C. § 1519, where the term "tangible object" is ambiguous and undefined in the statute, and unlike the nouns accompanying "tangible object" in section 1519, possesses no record-keeing, documentary, or informational content or purpose?

QUESTION 2:

Whether the Eleventh Circuit's affirmance of the district court's wholesale preclusion of Dr. Richard Cody from testifying at trial as either an expert or lay witness in the defense's case-in-chief as a drastic sanction for the defense's inadvertent failure to include Dr. Cody on the defense's trial witness list violated Mr. Yates's Fifth and Sixth Amendment rights to due process, compulsory process for obtaining witnesses in his favor, and to present a complete defense, even though even though Dr. Cody: (1) was listed as an expert witness on the government's trial witness list; (2) testified for the government in a *Daubert*[1] hearing on the morning that the jury trial commenced; and, (3) was under a defense subpoena for trial?

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1 *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

List of Parties

All parties appear in the caption of the case on the title page.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	iii
Table of Appendices	vi
Table of Authorities	vii
Petition for a Writ of Certiorari	1
Opinion Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	8
1. Congress's avowed purpose for 18 U.S.C. § 1519 is to prohibit the destruction, alteration, and falsification of records, documents, and similar items with record-keeping, documentary, or informational uses. The Eleventh Circuit, in holding incorrectly that the statute extends to entities such as "fish," deprived Mr. Yates of fair notice as to the conduct prohibited by the statute.	8

TABLE OF CONTENTS

Page

A. The Eleventh Circuit, in ruling that the vague and ambiguous term "tangible object" in § 1519 covers contraband items such as "fish," did not conduct a diligent inquiry into the plain meaning of the statute, which was intended by Congress to prohibit tampering with items having a record-keeing, documentary, or informational use. 12

B. Section 1519's legislative history and statutory context show that Congress's avowed purpose in enacting the statute was to prohibit the destruction, alteration, and falsification of records, documents, and "tangible objects," which are record-keeping modalities. 18

C. Mr. Yates was deprived of the right of fair warning because the Eleventh Circuit's construction, operating with *ex post facto* effect, unexpectedly and unfairly broadened the statute subsequent to Mr. Yates's alleged offense. 23

TABLE OF CONTENTS

Page

D. The proper construction of "tangible object" in section 1519 is an important question of federal law because the statute–with its harsh 20-year maximum penalty–is subject to arbitrary use by prosecutors in cases unrelated to the types of criminal conduct which are targeted by the statute. 26

2. This Court needs to clarify whether a district court's wholesale denial of a criminal defendant's request to call a government witness, either as an expert or lay witness, in the defense's case-in-chief as a sanction for the defense's inadvertent failure to include the government's witness on the defense's witness list violates the Fifth and Sixth Amendment rights' to due process, compulsory process for obtaining witnesses in his favor, and to present a complete defense . . 28

TABLE OF APPENDICES

United States v. Yates, No. 11-16093 , 2013 WL 4400426 (11th Cir. Aug. 16,2013) (affirming district court's judgment) . . . App. A

United States v. Yates, 2011 WL 3444093 (M.D. Fla. 2011) (unpub.) . App. B

50 C.F.R. § 622.2 (Oct. 1, 2006) . . . App. C

50 C.F.R. Part 622, App'x C (Oct. 1, 2006) . . App. D

TABLE OF AUTHORITIES

Cases	Page(s)
Almendarez-Torres v. United States, 523 U.S. 224 (1998)	19
Beecham v. United States, 511 U.S. 368 (1994)	16
Bouie v. City of Columbia 378 U.S. 347 (1964)	23, 24
Brotherhood of R.R. Trainmen v. Baltimore & O.R. Co., 331 U. S. 519 (1947)	15
Brown v. Gardner, 513 U.S. 115 (1994)	13
Chamber of Commerce v. Whiting, 131 S. Ct. 1986 (2011)	19
Chambers v. Mississippi, 410 U.S. 284 (1973)	28
Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001)	16
Connally v. General Const. Co., 269 U.S. 385 (1926)	8, 9
Crane v. Kentucky, 476 U.S. 683 (1985)	28
CSX Transp., Inc. v. Alabama Dept. of Revenue, 131 S. Ct. 1101 (2011)	16
Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993)	ii, 5, 30
Dolan v. United States Postal Service, 546 U.S. 481 (2006)	12
Dowling v. United States, 473 U.S. 207 (1985)	18
F.C.C. v. Fox Television Stations, 132 S. Ct. 2307 (2012)	26
Federal Mar. Comm'n v. Seatrain Line, Inc., 411 U.S. 726 (1973)	17
FTC v. Mandel Bros., Inc., 359 U.S. 385 (1959)	19
Gooch v. United States, 297 U.S. 124 (1936)	16
Grayned v. City of Rockford, 408 U.S. 104 (1972)	26
Harrington v. Richter, 131 S. Ct. 770 (2011)	31

TABLE OF AUTHORITIES

Cases	Page(s)
I.N.S. v. National Center for Immigrants' Rights, Inc., 502 U.S. 183 (1991)	15
Jarecki v. G.D. Searle & Co., 367 U.S. 303 (1961)	14
King v. St. Vincent's Hosp., 502 U.S. 215 (1991)	12
Kolender v. Lawson, 461 U.S. 352 (1983)	26
Liparota v. United States, 471 U.S. 419 (1985)	18
Marx v. General Revenue Corp., 133 S. Ct. 1166 (2013)	17
McBoyle v. United States, 283 U.S. 25 (1931)	24
Mead Corp. v. Tilley, 490 U.S. 714 (1989)	19
NLRB v. Federbush Co., 121 F.2d 954 (2d Cir. 1941)	12
Robinson v. Shell Oil Co., 519 U.S. 337 (1997)	12, 18
Shell Oil Co. v. Iowa Dept. of Revenue, 488 U.S. 19 (1988)	12
Skilling v. United States, 130 S. Ct. 2896 (2010)	27, 28
Smith v. Goguen, 415 U.S. 566 (1974)	26
Smith v. United States, 508 U.S. 223 (1993)	6, 10
Specht v. Patterson, 386 U.S. 605 (1967)	28
Strickland v. Washington, 466 U.S. 668 (1984)	31, 32
United States v. Atlantic States Cast Iron Pipe Co., 612 F. Supp.2d 453 (D. N.J. 2009)	25
United States v. Carrell, 252 F.3d 1193 (11th Cir. 2001)	10
United States v. Castro, 837 F.2d 441 (11th Cir. 1988)	15

Cases	Page(s)
United States v. Giuseppe Bottighlieri Shipping Co., 2012 WL 1899844 (S.D. Ala. 2012)	25
United States v. Hunt, 526 F.3d 739 (11th Cir. 2008)	10
United States v. Hurn, 368 F.3d 1359 (11th Cir. 2004)	29
United States v. Lanier, 520 U.S. 259 (1997)	22, 23
United States v. Perez, 603 F.3d 44 (D. D.C. 2010)	25
United States v. Reese, 92 U.S. 214 (1875)	26
United States v. Ron Pair Enterprises, 489 U.S. 235 (1989)	18, 19
United States v Russell, 639 F. Supp.2d (D. Conn. 2007)	25
United States v. Santos, 553 U.S. 507 (2008)	22
United States v. Sullivan, 578 F.2d 121 (5th Cir. 1978)	6, 11, 25
United States v. Williams, 553 U.S. 285 (2008)	14
United States v. Wortman, 488 F.3d 752 (7th Cir. 2007)	25
United States v. Vosburgh, 602 F.3d 512 (3rd Cir. 2010)	25
Washington v. Texas, 388 U.S. 14 (1967)	29
Zuni Public School Dist. v. Dept. of Educ., 50 U.S. 81 (2007)	13
Constitutional Provisions	
U.S. Const. amend V	2, 8, 28, 33
U.S. Const. amend VI	2, 8, 28, 33
U.S. Const. amend XIV	2, 28, 28

TABLE OF AUTHORITIES

Statutes	Page(s)
18 U.S.C. § 1519	*passim*
18 U.S.C. § 1520	20
18 U.S.C. § 2232	4, 17, 27, 30
Regulations	
50 C.F.R. § 622.2	3, 6, 35
Other	
Black's Law Dictionary (9th ed. 2009)	6, 10, 11
148 Cong. Rec. S7418-01, S7419 (daily ed. July 26, 2002)	20. 22
Sarbanes-Oxley Act of 2002 (H.R. 2673), Pub.L. 107-204 (July 30,2002)	*passim*

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2013

John L. Yates, Petitioner,

v.

United States of America, Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner John L. Yates respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit. *See United States v. Yates*, No. 11-16093, 2013 WL 4400426 (11th Cir. Aug. 16, 2013) (attached as Appendix A).

OPINION BELOW

The Eleventh Circuit Court of Appeals affirmed Mr. Yates's conviction on August 16, 2013, on the grounds set forth in this petition. *See* App. A.

JURISDICTION

The United States District Court for the Middle District of Florida had original jurisdiction over this criminal case, pursuant to 18 U.S.C. § 3231. An appeal from that court's final judgment proceeded for review by the Eleventh Circuit Court of Appeals,

in accordance with 28 U.S.C. § 1291 and 18 U.S.C. § 3742. The Eleventh Circuit affirmed the district court judgment on August 16, 2013. *See* App. A. This Court's jurisdiction is invoked by the timely filing of this Petition for Writ of Certiorari within the prescribed 90 days from the date the final judgment was rendered. *See* 28 U.S.C. § 1254(1); S. Ct. R. 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides in relevant part:

> No person shall be . deprived of life, liberty, or property, without due process of law

The Sixth Amendment to the U.S. Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

The Fourteenth Amendment to the U.S. Constitution provides in pertinent part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law

Section 1519 of Title 18, United States Code, provides:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

STATEMENT OF THE CASE

John Yates, a commercial fisherman, received a civil fishing citation from the Florida Fish and Wildlife Commission (FWC) (whose officers were deputized as federal agents), for allegedly having on board 72 undersized red grouper fish. It was subsequently alleged that, before returning to port, Mr. Yates ordered that the purportedly undersized fish be thrown overboard because, upon return from the fishing trip, FWC officers only found 69 undersized fish. From the FWC officer's initial contact with Mr. Yates on his fishing vessel in the Gulf of Mexico, Mr. Yates contended that fish were *not* "undersized" because the FWC officer did not measure the fish in accordance with federal law, which requires that the fish be measured in a manner which creates the "greatest overall length." Specifically, 50 C.F.R. § 622.2 requires that fish be measured with their mouths open or closed, and their tails squeezed or not squeezed, whichever results in the "greatest overall length." 50 C.F.R. § 622.2, 50 C.F.R., Part 622, App'x C (Figure 2).[2]

Years after the issuance of the civil fishing citation, Mr. Yates was charged with, and found guilty of, counts one and two of a three-count indictment.[3] Specifically, count one charged that Mr. Yates "did knowingly dispose of and throw overboard and

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[2] At trial, the FWC officer testified that he did not measure the fish to obtain the greatest overall length, as required by federal law. He testified that he instead measured them "the greatest practical way."

[3] Mr. Yates was also charged with–but acquitted of–willfully making "a materially false, fictitious, and fraudulent statement" to Federal agents, in violation of 18 U.S.C. § 1001(a)(2).

attempt to dispose of and throw overboard undersized fish, for the purpose of preventing and impairing the Government's lawful authority to take such property into its custody and control," in violation of 18 U.S.C. §§ 2232(a) and 2. Count two charged that Mr. Yates "did knowingly destroy, conceal, and cover up 'undersized fish' with the intent 'to impede, obstruct, and influence the investigation and proper administration of the catching of red grouper under the legal minimum size limit,' in violation of 18 U.S.C. §§ 1519 and 2."

The central theory of Mr. Yates's defense at trial was that the fish that he harvested from the Gulf of Mexico were not "undersized," as alleged and charged in the indictment, because they were not measured by FWC officers in accordance with federal law, which provided that fish be measured in a manner to produce the greatest overall length. Had the fish been measured according to federal law, he contended at trial, they would have measured within the legal limits.

At trial, the defense called an expert witness, William Ward, during its case-in-chief, who testified that the red grouper were not measured in accordance with federal law and, had the red grouper been measured pursuant to federal law, they would have measured larger. On cross-examination and during its closing arguments, the government vehemently attacked Mr. Ward's credibility, arguing to the jury that he should not be believed because he had an "axe to grind" with the government due to fines he had previously received during his tenure as manager of a fish wholesale warehouse. In an attempt to rehabilitate Mr. Ward's testimony that red grouper measure larger with their mouths open and were thus not "undersized," as charged in

the indictment, Mr. Yates sought to call in his case-in-chief the government's expert, Dr. Richard Cody, who had previously testified for the government at a *Daubert* hearing on the morning that the jury trial commenced and who was also under defense subpoena to testify at trial.[4]

The government objected to Mr. Yates calling Dr. Cody (its own listed expert witness) during his case-in-chief, and requested that the district court exclude Dr. Cody from testifying in the defense's case-in-chief because Dr. Cody was not placed on the *defense's* trial witness list. The district court agreed with the government and, as a sanction for the failure to disclose Dr. Cody on the defense's witness list, precluded Dr. Cody from testifying as either an expert *or* lay witness.

At the conclusion of both the government's case-in-chief and of all evidence, the defense moved for judgments of acquittal as to both counts one and two. First, Mr. Yates moved for acquittal as to count two, arguing that 18 U.S.C. § 1519 is "a records-keeping statute aimed solely at destruction of records and documents, and could not be applied to a situation, as here, where it was fish which were destroyed." The district court initially questioned whether fish were within the meaning of "tangible object" as follows:

> Isn't there a Latin phrase–I'm not good at remembering it–in terms of construction of a statute that you take a look at the line of words, and you interpret the words consistently. So if you're talking about

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[4] At the *Daubert* hearing, Dr. Cody had testified that red grouper indeed measure larger with their mouths open, as opposed to mouths closed, which is how the Florida FWC officer had improperly measured them.

> documents, and records, tangible objects are tangible objects in the nature of a document or record, as opposed to a fish.
>
> . . . [I]f you look at the title for at least a clue as to what congress meant, it talks about destruction, alteration, or falsification of records in federal investigations. It might be a stretch to say throwing away a fish is a falsification of a record.

In a written opinion, however, the district court reasoned that section 1519's inclusion of the "independent term" "tangible object" within its text indicates that the statute was not intended to apply merely to a "'record' or 'document.'" App. B at 2. The district court concluded:

> Given the nature of the matters within the jurisdiction of the government agency involved in this case, and the broad language of § 1519, the Court finds that a reasonable jury could determine that a person who throws or causes to be thrown fish overboard in the circumstances of this case is in violation of § 1519.

App. B at 1. Mr. Yates was subsequently adjudicated guilty and is now serving a term of supervised release. On appeal to the Eleventh Circuit, Mr. Yates argued that 18 U.S.C. § 1519, which prohibits obstruction of justice in connection with the destruction, alteration, or falsification of "any document, record, or tangible object," did not apply to the alleged destruction of fish for which he was charged.

The Eleventh Circuit, in affirming the judgment of the district court, disagreed as follows:

> [U]ndefined words in a statute–such as "tangible object" in this instance–are given their ordinary or natural meaning. *Smith v. United States*, 508 U.S. 223, 228, 113 S. Ct. 2050, 2054 (1993). In keeping with those principles, we conclude "tangible object," as § 1519 uses that term, unambiguously applies to fish. See BLACK'S LAW DICTIONARY 1592 (9th ed. 2009) (defining "tangible" as "[h]aving or possessing physical form"); see also *United States v. Sullivan*, 578 F.2d 121, 124 (5th Cir. 1978)

(noting that cocaine is a "tangible object" subject to examination and inspection under Rule 16(a) of the Rules of Criminal Procedure).

App. A at 4.

REASONS FOR GRANTING THE WRIT

QUESTION 1: Congress's avowed purpose for 18 U.S.C. § 1519 is to prohibit the destruction, alteration, and falsification of records, documents, and similar items with record-keeping, documentary, or informational uses. The Eleventh Circuit, in holding incorrectly that the statute extends to entities such as "fish," deprived Mr. Yates of fair notice as to the conduct prohibited by the statute.

This petition presents an important question needing resolution by this Court. The use of the term "tangible object" in section 1519 is so vague and ambiguous that the statute fails to give individuals constitutionally required fair notice of its prohibited conduct. Further, as interpreted by the Eleventh Circuit, section 1519 is overbroad, indeed limitless, in its reach. Mr. Yates contends that section 1519, enacted as part of the "anti-shredding provision" of the Sarbanes-Oxley Act of 2002, was never intended to prohibit the destruction of non-documentary, non-informational items such as fish and thus did not apply to his alleged destruction of fish.

In *Connally v. General Const Co.*, this Court restated the principle, grounded in the Fifth, Sixth, and Fourteenth Amendments, that criminal statutes be worded explicitly enough to provide "fair notice" of the behavior they proscribe:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must

> necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

269 U.S. 385, 391 (citations omitted).

Here, Mr. Yates, a commercial fisherman, was convicted of one count of destroying an aggregate *of three* purportedly undersized red grouper (fish) in violation of 18 U.S.C. § 1519. Congress could not have meant for the destruction of fish to fall under section 1519. Section 1519, entitled "Destruction, alteration, or falsification of *records* in Federal investigations and bankruptcy," was enacted into law as part of the Sarbanes-Oxley Act of 2002 and provides criminal sanctions against anyone who

> knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, ***or tangible object*** with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case

18 U.S.C. § 1519 (emphasis supplied).

Mr. Yates contended on appeal to the United States Court of Appeals for the Eleventh Circuit that the district court erred in denying his motion for judgment of acquittal as to the charge of violating section 1519, arguing that the term "tangible object" as used in the statute only applies to records, documents, or tangible items that relate to record-keeping and does not apply to fish. Indeed, no reasonable reading of section 1519 put Mr. Yates on notice that his alleged destruction of fish would have violated section 1519.

The Eleventh Circuit, however, disagreed. Noting that "undefined words in a statute . . are given their ordinary or natural meaning," and consulting *Black's Law Dictionary* for the definition of "tangible," the court ruled that "'tangible object, as § 1519 uses that term, unambiguously applies to fish." App. A at 3-4. Finding the term "tangible object" not to be ambiguous, the Eleventh Circuit further reasoned that there was no basis for applying the Rule of Lenity and interpreting section 1519 in Mr. Yates's favor. *Id.*

The Eleventh Circuit's opinion devoted just a single paragraph in ruling that the term "tangible object" in section 1519 is used "unambiguously" and therefore can be applied to "fish." In so doing, the court cited three legal authorities to set forth the uncontroversial principle that, in statutory construction, inquiries must start by examining the "plain meaning" of the text.[3] In finding the term unambiguous, the court pointedly warned against further inquiry into the statute as follows, "When the text of a statute is plain, we need not concern ourselves with contrary intent or purpose revealed by the legislative history." App. A at 10 (citing *United States v. Carrell*, 252 F.3d 1193, 1198 (11th Cir. 2001)). As specific authority for holding that

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[3] *United States v. Carrell*, 252 F.3d 1193, 1198 (11th Cir. 2001); *United States v. Hunt*, 526 F.3d 739, 744 (11th Cir. 2008); *Smith v. United States*, 508 U.S. 223, 228 (1993). App. A at 4. Although not discussed by the Eleventh Circuit, *Hunt* also has some substantive relevance: The defendant Hunt, convicted of violating section 1519 for falsifying a police report, argued that he was denied fair notice of the charge against him because his conduct was "not the type contemplated by Congress when it passed the statute." *Hunt* at 743. The court brushed aside Hunt's attempt to invoke the statute's legislative history, stating, "Section 1519 covered Hunt's behavior; the context of [the statute's] passage is of no moment." *Id.* at 744. The construction of "tangible object" was not an issue in *Hunt*.

"tangible object" covers non-informational items such as fish, the court cited only a Fifth Circuit drug-conspiracy decision, issued some 14 years *prior to* the existence of section 1519, in which the defendant moved to inspect seized cocaine pursuant to Fed. R. Crim. P. 16(a)(1)(E), which mentions "tangible objects." *Id.* (*citing United States v. Sullivan*, 578 F.2d 121, 124 (5th Cir. 1978)). The facts of *Sullivan* are unclear and its relevance is tenuous.

Lacking any persuasive judicial authority for its interpretation of "tangible object," the Eleventh Circuit might have engaged in a serious effort to construe the statutory text in question but chose not to do so. Instead, the court performed only a perfunctory inquiry centering on a dictionary's definition of the word "tangible."

The court began by stating two well accepted principles: (1) that "the plain meaning of the statute controls unless the language is ambiguous or leads to absurd results," and (2) that "undefined words in a statute–such as 'tangible object' in this instance–are given their ordinary or natural meaning." App. A at 4 (citations omitted). The court then simply consulted *Black's Law Dictionary* for the definition of "tangible." Finding the word defined as "[h]aving or possessing physical form," the Eleventh Circuit ended the inquiry and ruled that "tangible object" "unambiguously applies to fish." *Id.* In failing to see any vagueness or ambiguity in the term "tangible object," the Eleventh Circuit ignored an important legal problem posed by the statute–that of the statute's proper scope–and abrogated its responsibility to conduct a serious examination of the statute's text to determine its scope.

A. The Eleventh Circuit, in ruling that the vague and ambiguous term "tangible object" in section 1519 covers contraband items such as "fish," did not conduct a diligent inquiry into the plain meaning of the statute, which was intended by Congress to prohibit tampering with items having a record-keeping, documentary, or informational use.

Mr. Yates agrees that statutory construction–including determining questions of vagueness and ambiguity–must begin with the "plain language" of the text, and that words should be given their "ordinary and natural meaning." He points out, however, that the "ordinary and natural meaning" of an isolated term, as found in a dictionary's definition, is not necessarily "plain" in the context of a criminal statute. As this Court has recognized countless times, "the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). "'Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used. . '" *Shell Oil Co. v. Iowa Dept. of Revenue*, 488 U.S. 19, 25 (1988) (quoting *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941)). This Court has so instructed as follows:

> The definition of words in isolation . is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.

Dolan v. United States Postal Service, 546 U.S. 481, 486 (2006).

Jurisprudence abounds with cases in which a word or phrase whose dictionary definition is facially "plain," turns out to be vague or ambiguous as used within a given statute. For example, in *Zuni Public School Dist. v. Dept. of Education*, 550 U.S. 81 (2007), this Court encountered a statutory term ("percentile") whose literal meaning–as found in several dictionaries–was absolutely clear, butyet was troublesomely ambiguous as used in the statute. As this Court concluded, "[A]mbiguity, is a creature not [just] of definitional possibiliti es but [also] of statutory context. [M]eaning–*or ambiguity*–of certain words or phrases may only become evident when placed in context." 550 U.S. at 98-99 (citations omitted; brackets and emphasis in original). *See also Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory context.").

This, Mr. Yates argues, is the difficulty with understanding the intended meaning of "tangible object" as used in section 1519: The ambiguity of the term–which is not evident from its bare dictionary definition–"only become[s] evident when placed in context." *Zuni Public School Dist.*, 550 U.S. at 98. The Eleventh Circuit never conducted that analysis. A dictionary can *define* "tangible," but the *definition* of a term is not the same as its *referent*, *i.e.*, the thing to which the term refers in context. Mr. Yates submits that "tangible object" in section 1519 is vague and ambiguous on its face, and therefore fails to provide fair notice as to the scope of the statute, unless construed in a manner consistent with the statute as a whole. Had the Eleventh Circuit considered "tangible object" in its overall statutory context, its vagueness and ambiguity would have been evident, and the court would have made a proper inquiry

into its proper meaning, perhaps guided by one or more of the many "canons" commonly used for the purpose.

The canon *noscitur a sociis* ("it is known from its associates"), perhaps the most familiar canon of statutory construction, stands for the common-sense principle that vague or ambiguous terms usually share some common meaning with their surrounding language. *See United States v. Williams*, 553 U.S. 285, 294 (2008) (explaining that "a word is given more precise content by the neighboring words with which it is associated"). "The maxim noscitur a sociis . . is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).

Section 1519, entitled "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy," penalizes anyone who:

> . . knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States.

18 U.S.C. § 1519 (emphasis supplied). Considering the statute's textual elements in the light of *noscitur a sociis*, it is evident that the statute is concerned only with records, documents, and items which are somehow similar or related to documents and record-keeping modalities.

The statute's title, in its entirety, applies *exclusively* to records (whether paper or electronic).[6] Not only is the word *records* specified to be the subject of the statute, the overall context of the title makes clear that the words *destruction, alteration,* and *falsification* can be understood only as applying to records and the like. *See Brotherhood of R. R. Trainmen v. Baltimore & O. R.*, 331 U.S. 519, 528-29 (1947) (noting that for "interpretive purposes," the title of a statute and the heading of a section "are of use only when they shed light on some ambiguous word or phrase"); *cf. I.N.S. v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("[W]e have stated that the title of a statute or section can aid in resolving ambiguity in the legislation's text.").

Within the body of the statute, the key "objects" in the statute are, indisputably, the nouns *record* (repeating the word *records* as used in the title) and *document.* Of the verbs listed, two (*conceals* and *covers up*) could arguably apply *both* to informational and other items (whether paper or electronic), while *mutilates* unambiguously applies to documents.[7] *Alters, destroys,* and *falsifies* as used in section

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[6] Significantly, the title was given to section 1519 in its original enactment by Congress and is not a later addition. The Eleventh Circuit has recognized, "where section subtitle was not added by publisher or codifier, but was part of act as written and passed by Congress, subtitle was an indication of congressional intent by a clerk or editor." *United States v. Castro*, 837 F.2d 441, 442 n.1 (11th Cir. 1988).

[7] "*mutilate*, v. 1. *trans.* To render (a thing, esp. a book or other document) imperfect by cutting out or excising a part; to charge or destroy part of the content or meaning of." *Oxford English Dictionary*, http://www.oed.com. The second sense given to *mutilate* has to do with living beings: "To deprive (a person or animal) of the use of a limb or bodily organ, by dismemberment or otherwise " The third sense of *mutilate* is purely figurative: "to cut back or curtail so as to render ineffectual; to

1519 necessarily refer *only* to records and similar entities, because these terms are referenced (in their nominalized form) in the statute's title, where no ambiguity exists. Significantly, the verb phrase *makes a false entry in* has no possible object or application *except* to a record or document of some kind.[8]

A further canon of statutory construction, *ejusdem generis* ("of the same kind"), also supports Mr. Yates's interpretation of "tangible object" in section 1519. This canon "'limits general terms [that] follow specific ones to matters similar to those specified.'" *CSX Transp., Inc. v. Alabama Dept. of Revenue*, 131 S. Ct. 1101, 1113 (2011) (quoting *Gooch v. United States*, 297 U.S. 124, 128 (1936)). That is, the maxim of *ejusdem generis* instructs that "[w]here general words follow specific words in a statutory enumeration, the general words are to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) (internal quotation and citation omitted). Therefore, when "several items in a list share an attribute," *ejusdem generis* "counsels in favor of interpreting the other items as possessing that attribute as well." *Beecham v. United States*, 511 U.S. 368, 371 (1994). This principle is particularly applicable to general catchall clauses at the end of a statutory list. Those catchall clauses should not be read as opportunities to insert substantially different items into the statute, but

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impose brutal or ruinous change on."

[8] *See, e.g.*, 18 U.S.C. § 1005, which prohibits "*mak[ing] any false entry . . . in* any book, report, or statement of such bank, company, branch, agency or organization with intent to injure or defraud . . " (emphasis supplied).

instead, they should be read "as bringing within a statute categories similar to those specifically enumerated." *Federal Mar. Comm'n v. Seatrain Line, Inc.*, 411 U.S. 726, 734 (1973).

The operative text in section 1519 is "any *record, document, or tangible object.*" Consistent with the principle of *ejusdem generis* (as well as grammatical parallelism and common sense), the more general final catchall-like term (*tangible object*) is informed by the specific terms it follows (*record, document*). Both *record* and *document* share a common meaning having to do with the recording or documentation of information, whether on paper or electronically. The meaning of the less specific (more general) term *tangible object*, therefore, must be *"of the same kind"* as *records and documents*.

The canon *expressio unius est exclusio alterius* also provides some guidance.[9] While section 1519 specifies "any record, document, or tangible object" as its subject matter, the statute nowhere includes *evidence, property, contraband* or similar terms, which would perhaps be expected had Congress intended section 1519 to cover the same conduct that is targeted in 18 U.S.C. § 2232(a) (under which Mr. Yates was also convicted). Section 2232(a), prohibiting the "Destruction or removal of *property* to prevent seizure," appropriately covers contraband and other items subject to seizure (usually for use as evidence), whereas section 1519–motivated by the white-collar

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[9] "The express mention of one thing excludes all others"; *i.e.*, items not listed in a statute are assumed not to be covered by the statute. *Marx v. General Revenue Corp.*, 133 S. Ct. 1166, 1181 (2013).

criminality concerns of Sarbanes-Oxley–applies specifically to records, documents and related informational items.

Given the vagueness (or ambiguity) of *tangible object* in the context of section 1519, Mr. Yates does not presume to know the precise meaning of the term. It is indisputable, however, that the term must have as its referent, something that shares significant qualities with "record" and "document"–in all likelihood, computer drives and other digital media. To insist on a broader interpretation is to add to the term's existing vagueness and create an offense element where none was intended by Congress.

B. **Section 1519's legislative history and statutory context show that Congress's avowed purpose in enacting the statute was to prohibit the destruction, alteration, and falsification of records, documents, and "tangible objects," which are record-keeping modalities.**

As this Court has stated, "Federal crimes 'are solely creatures of statute.' *Liparota v. United States*, 471 U.S. 419, 424 (1985), ... Accordingly, when assessing the reach of a federal criminal statute, we must pay close heed to language, legislative history, and purpose in order strictly to determine the scope of the conduct the enactment forbids." *Dowling v. United States*, 473 U.S. 207, 213 (1985) (citation omitted). "'The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *Robinson v. Shell Oil Co.*, 519 U.S. 337, 34 (1997) (quoting *United States v. Ron Pair Enterprises*, 489 U.S. 235, 240 (1989)).

As previously noted, section 1519 was enacted as part of the Sarbanes-Oxley Act of 2002, also known as the Public Company Accounting Reform and Investor Protection Act and the Corporate and Auditing Accountability and Responsibility Act. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002). Congress's avowed purpose in enacting Sarbanes-Oxley is stated clearly in the Act's descriptive subtitle, which reads, "An Act to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes."[10] *Id.*

As the title of Sarbanes-Oxley indicates, the Act was a sweeping reform effort by Congress to address white-collar fraud and misconduct of the type associated with a number of high-profile corporate accounting scandals such as those involving the collapses of Enron Corporation and WorldCom. Section 1519, encompassed within Sarbanes-Oxley as a new "anti shredding provision," is one of two subsections which constitute Section 802 of Title VIII of the Act. Title VIII is entitled the "Corporate and Criminal Fraud Accountability Act of 2002." *Id.* at 800.

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[10] "[W]e have stated that the title of a statute or section can aid in resolving an ambiguity in the legislation's text. *See Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989); *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 388-89 (1959). cf. *Chamber of Commerce v. Whiting*, 131 S. Ct. 1986 (2011). *See also Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("We also note that 'the title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute.").

Section 802, in which 18 U.S.C. § 1519 was placed, is entitled "Criminal Penalties for Altering Documents" and is one of seven substantive sections in Title VIII aimed at addressing criminal corporate securities fraud. *Id.*

Codified within section 802 of the Act, 18 U.S.C. § 1519 is paired with a related penal subsection, 18 U.S.C. § 1520, entitled "Destruction of corporate audit records." *Id.* 18 U.S.C. § 1520 directs the Securities and Exchange Commission to promulgate rules for the retention of documents and records (including electronic records) and penalizes accountants for willfully failing to preserve "workpapers" of audits conducted for issuers of regulated securities. *Id.* Nothing in Title VIII of Sarbanes-Oxley suggests a concern for anything unrelated to records, documents, or other informational entities.

It is also instructive to consult the pre-enactment "legislative history" material for Title VIII, which was placed into the Congressional Record on July 26, 2002. *See* 148 Cong. Rec. S7418-01, S7418 (daily ed. July 26, 2002). This material was entitled "Section-By-Section Analysis and Discussion of the Corporate and Criminal Fraud Accountability Act (Title VIII of H.R. 2673)." *Id.* The "Analysis" states of Section 802:

> This section provides two new criminal statutes which would clarify and plug holes in the current criminal laws relating to the destruction or fabrication of evidence and the preservation of financial and audit records.
>
> First, this section would create a new 20-year felony [i.e., § 1519] which could be effectively used in a wide array of cases where a person destroys or creates evidence with the intent to obstruct an investigation or matter that is, as a factual matter, within the jurisdiction of any federal agency or any bankruptcy.

Id. In isolation, the reference to "evidence" is rather broad and sheds little light–either favorable or unfavorable to Mr. Yates – on the meaning of scope of section 1519. However, the meaning of "evidence"–and thus the intended meaning of "tangible object" – in section 1519 – is made clear in the succeeding "Discussion" section:

> Section 802 creates two new felonies to clarify and close loopholes in the existing criminal laws relating to the destruction or fabrication of evidence and the preservation of financial and audit records. First, it creates a new ***general anti shredding provision***, 18 U.S.C. [§] 1519, with a 10-year [sic] maximum prison sentence. Currently provisions governing the destruction or fabrication of evidence are a patchwork that have been interpreted, often very narrowly, by federal courts. For instance, certain current provisions make it a crime to persuade another person to ***destroy documents***, but not a crime to actually ***destroy the same documents*** yourself.

Id. at S7419 (emphasis supplied). The Discussion further states that the Act is meant to "apply broadly to any acts to destroy or fabricate physical evidence,"[11] but subsequently reveals the meaning of "evidence," in explaining, the statute "could also be used to prosecute a person who actually destroys ***the records*** himself in addition to one who persuades another to do so." *Id.* (emphasis supplied). The Discussion concludes, "*The intent of the provision* [i.e., § 1519] *is simple: people should not be destroying, altering, or falsifying documents to obstruct any government function.*" *Id.* (emphasis supplied).

To summarize, the overall context and Congressional intent for section 1519 could not be more explicit: (1) The statute was created as part of Sarbanes-Oxley, an

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[11] "Physical evidence" is broad in scope but is used here in the context of "[d]estroying or falsifying documents" and clearly refers to records and documents. *Id.* at 4.

act avowedly intended by Congress "[t]o protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws ..." Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002); (2) The statute was placed within a title of Sarbanes-Oxley entitled "Corporate and Criminal Fraud Accountability," *id.*; (3) The statute forms part of Section 802, which is titled "Criminal Penalties for Altering Documents," and is paired with a prohibition against the "Destruction of corporate audit records," *id.*; (4) The statute, as enacted by Congress, was specifically titled "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy," *see* 18 U.S.C. § 1519; and (5). The legislative history shows that section 1519 was intended by Congress to be a "general anti shredding provision" prohibiting people from "destroying, altering, or falsifying documents." 148 Cong. Rec. at S7419.[12] For the Eleventh Circuit to interpret section 1519 as applying to the destruction of non-documentary, non-record, non-informational objects such as "fish" negates the statute's plain text, history, and Congress's intent as well.

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[12] At a minimum, the ambiguous nature of section 1519's language, should have triggered the rule of lenity, which requires that the statute be strictly construed and applied only to clearly covered conduct, not to the conduct charged in this case. *See United States v. Lanier*, 520 U.S. 259, 266 (1997). "This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected punishment that is not clearly prescribed." *United States v. Santos*, 553 U.S. 507, 514 (2008) (collecting cases).

C. **Mr. Yates was deprived of the right of fair warning because the Eleventh Circuit's construction, operating with *ex post facto* effect, unexpectedly and unfairly broadened the statute subsequent to Mr. Yates's alleged offense.**

In *United States v. Lanier*, 520 U.S. 259 (1997), this Court identified "three related manifestations of the fair warning requirement." *Id.* at 266. One manifestation "bars enforcement of 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning ' " *Id.* (citations omitted). The second manifestation requires courts to apply the "rule of lenity" in cases of statutory ambiguity. *Id.* Finally, this Court held that an unexpected, retroactive judicial construction of a statute could constitute a due process violation with the effect of an *ex post facto* law:

> [D]ue process bars courts from applying a *novel construction* of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope. In each of these guises, the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear *at the relevant time* that the defendant's conduct was criminal.

Id. (internal quotation and citation omitted, emphasis supplied).

In *Bouie v. City of Columbia*, 378 U.S. 347 (1964), this Court noted that even when statutory language is seemingly "narrow and precise," a novel judicial construction can have an unconstitutional *ex post facto* impact:

> [A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law," [which is defined as] one 'that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action,'

> or 'that aggravates a crime, or makes it greater than it was, when committed. If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that [a court] is barred by the Due Process Clause from achieving precisely the same result by judicial construction. . . . [The fundamental principle is] that the 'required criminal law must have existed when the conduct in issue occurred.' . . If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect.

Id. at 353-54 (citations omitted).[13]

Mr. Yates contends that at the time of his alleged offense, section 1519 did not give him fair notice of "what the law intend[ed] to do if a certain line [was] passed.[14] Only later, by the Eleventh Circuit's expansion of section 1519 to cover the destruction of objects of any and every conceivable kind, was his conduct criminalized by the statute.[15]

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[13] This Court noted in *Bouie*, "While such a construction is of course valid for the future, it may not be applied retroactively, any more than a legislative enactment may be, to impose criminal penalties for conduct committed at a time when it was not fairly stated to be criminal." 378 U.S. at 362.

[14] This Court has observed, "Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

[15] Mr. Yates's situation parallels that of the petitioners in *Bouie*: the petitioners (civil rights demonstrators) had notice that their conduct was in "breach of the peace," but they could not know they would be charged with the more serious "criminal trespass," based on a retroactive judicial broadening of the trespass statute by the South Carolina Supreme Court.

The retroactive nature of the Eleventh Circuit's holding (supporting a ruling by the district court) is clear. No other Court of Appeals had ruled on the proper construction of "tangible object" in section 1519. As noted above, the Eleventh Circuit cited as authority only a Fifth Circuit decision which involved a Federal Rule of Criminal Procedure–not section 1519 or any other statute–and which was unpersuasive on other grounds. App A. at 10 (citing *Sullivan*, 578 F.2d at 124).[16] The authorities cited by the government in the case below are similarly inapposite. They are either non-precedential district court rulings on trial motions or cases in which the reach of section 1519's "tangible object" was not raised or addressed,[17] or cases involving statutes other than section 1519.

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[16] *United States v. Sullivan*, 578 F.2d 121, 124 (5th Cir. 1978).

[17] *United States v. Perez*, 603 F.3d 44 (D.C. Cir 2010) (destruction of cocaine); *United States v. Atlantic States Cast Iron Pipe Co.*, 612 F. Supp.2d 453 (D .N.J. (2009) (destruction of pipe in OSHA violation); *United States v. Russell*, 639 F. Supp.2d 266 (D. Conn. 2007) (destruction of computer containing child pornography); *United States v. Giuseppe Bottiglieri Shipping Co.*, 2012 WL 1899844 (S.D. Ala. 2012) (falsification of vessel's oil record book and removal of illegal pipe); *United States v. Wortman*, 488 F.3d 752 (7th Cir. 2007) (destruction of computer CD containing child pornography); *United States v. Vosburgh*, 602 F.3d 512 (3rd Cir. 2010) (destruction of computer drive and thumb drive containing child pornography).

D. **The proper construction of "tangible object" in section 1519 is an important question of federal law because the statute–with its harsh 20-year maximum penalty–is subject to arbitrary use by prosecutors in cases unrelated to the types of criminal conduct which are targeted by the statute.**

One of the constitutional objections to "vague laws" recognized by this Court is the risk of "arbitrary and discriminatory enforcement." *Grayned, v. City of Rockford,* 408 U.S. 104, 108-109 (1972). This Court has directed that:

> [L]aws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Id.; see also F.C.C. v. Fox Television Stations, 132 S. Ct. 2307, 2317 (2012) ("[P]recision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.").

> Although the [void-for-vagueness] doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine "is not actual notice, but the other principal element of the doctrine–the requirement that a legislature establish minimal guidelines to govern law enforcement." . . Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."

Kolender v. Lawson, 461 U.S. 352, 357-358 (1983) (quoting *Smith v. Goguen*, 415 U.S. 566, 574-575 (1974)); *see also United States v. Reese*, 92 U.S. 214, 221 (1875) ("It would certainly be dangerous if the legislature could set a net large enough to catch all

possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.").

A statute whose meaning is not stated with precision fails to provide minimal guidance to prosecutors and lends itself to opportunistic and arbitrary prosecution. This is particularly true of statutes such as section 1519, which carry extremely harsh penalties. Mr. Yates, whom the government prosecuted criminally for a thoughtless "obstructive" act following a minor civil fishing infraction, was duly charged under the appropriate statute: section 2232(a) (Destruction or removal of property to prevent seizure). However, because the maximum prison term permitted under section 2232(a) is only five years, the government "shopped" for an additional, more severe charging statute. Section 1519 was opportune, since it permits a maximum penalty of 20 years in prison.[18] No matter that section 1519 was intended by Congress as an anti-shredding statute targeting the destruction of records, documents, and the like, it contains one piece of language–"tangible object"–that is so vague, ambiguous, and unspecific, it can be made to cover a truly boundless range of subject matter having little to do with Congress's intent for the statute. If the Eleventh Circuit's holding is left to stand, section 1519 will continue to allow prosecutors to "pursue their personal

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[18] Most comparable obstruction-of-justice statutes carry a lesser maximum penalty. In addition to 18 U.S.C. § 2232, *see* 18 U.S.C. § 1505 (Obstruction of proceedings before departments, agencies, and committees – five year statutory maximum); 18 U.S.C. § 1506 (Theft or alteration of record or process - five year statutory maximum) five years; 18 U.S.C. § 1511 (Obstruction of State or local law enforcement [in illegal gambling matter] - five year statutory maximum).

predilections" and "facilitat[e] opportunistic and arbitrary prosecutions." *Skilling v. United States*, 130 S. Ct. 2896, 2928 (2010).

QUESTION 2: **This Court needs to clarify whether a district court's wholesale denial of a criminal defendant's request to call a government witness, either as an expert or lay witness, in the defense's case-in-chief as a sanction for the defense's inadvertent failure to include the government's witness on the defense's witness list violates the Fifth and Sixth Amendment rights' to due process, compulsory process for obtaining witnesses in his favor, and to present a complete defense.**

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). "It is surely true that a defendant must be afforded the opportunity to present a defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1985); *cf. Specht v. Patterson*, 386 U.S. 605, 610 (1967) ("Due process ... requires that [the defendant] . have an opportunity to be heard ... and to offer evidence of his own."). This Court has explained as follows:

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard.

Crane, 476 U.S. at 690 (internal quotation marks and citations omitted). And, the "most obvious component of a defendant's Fifth and Sixth Amendment right to present

evidence in his favor is to present evidence that has a direct bearing on a formal element of the charged offense." *United States v. Hurn*, 368 F.3d 1359, 1363-65 (11th Cir. 2004) (citing *Washington v. Texas*, 388 U.S. 14, 23 (1967) ("[T]he petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness ... whose testimony would have been relevant and material to the defense.")).

Here, the indictment charged Mr. Yates on the theory that he disposed of, or destroyed, "undersized" fish. The central theory of Mr. Yates's defense was that the fish that he harvested from the Gulf of Mexico were not "undersized," as alleged and charged in the indictment, because they were not measured by the FWC officers in accordance with federal law, which provided that fish be measured in a manner to produce the greatest overall length. Had the fish been measured according to federal law, he contended, they would have measured larger than was indicated by the improper measurement technique utilized by the Florida Fish and Wildlife (FWC) officer.

At trial, the defense called an expert witness, William Ward, who testified that the red grouper were *not* measured in accordance with federal law and, had the red grouper been measured pursuant to federal law, they would have measured larger. The government vehemently attacked Mr. Ward's testimony, suggesting that he had an "axe to grind" with the government due to fines he had previously received during his tenure operating a fish wholesale warehouse. In an attempt to rehabilitate Mr. Ward's testimony that red grouper measure larger with their mouths open, the defense

sought to call the government's expert, Dr. Richard Cody, who had previously testified at a *Daubert* hearing in Mr. Yates's case the morning that the jury trial commenced, and who was under defense subpoena to testify at trial (but was not called by the government at trial in its case-in-chief).

At the *Daubert* hearing, Dr. Cody testified that red grouper indeed measure larger with their mouths open, as opposed to mouths closed, which is how the FWC officer had improperly measured them. The government objected to Mr. Yates calling Dr. Cody during the defense's case-in-chief, and requested that the district court exclude the government's own witness from testifying in the defense's case-in-chief because Dr. Cody was not placed *on the defense's witness list*. The district court agreed with the government and, as a sanction for the failure to disclose Dr. Cody on the defense's witness list, precluded Dr. Cody from testifying as either an expert *or* lay witness.

Mr. Yates was convicted of: (count one) knowingly disposing of and throwing overboard and attempting to dispose of and throw overboard *"undersized* fish," for the purpose of "preventing and impairing the Government's lawful authority to take such property into its custody and control," in violation of 18 U.S.C. § 2232(a); and (count 2) knowingly destroying, concealing, and covering up "undersized fish" with the intent "to impede, obstruct, and influence the investigation and proper administration of the catching of red grouper under the legal minimum size limit," in violation of 18 U.S.C. § 1519.

The Eleventh Circuit ruled that the district court did not abuse its discretion in excluding Dr. Cody's expert testimony as a sanction for "untimely disclosure" pursuant to Federal Rule of Criminal Procedure 16(b)(1)(C), because Yates "failed to show the preclusion prejudiced his rights to present a defense." The Eleventh Circuit reasoned that Mr. Ward "offered the same testimony Yates hoped to elicit from Dr. Cody." App. A at 12. Next, the Eleventh Circuit summarily concluded that "our review of the record shows Dr. Cody's testimony would have been less favorable to Yates than that of Mr. Ward." App. A at 11-12. And, third, the Eleventh Circuit ruled that "Yates's inability to offer Dr. Cody's testimony to rehabilitate Dr. Ward's credibility does not amount to prejudice of his substantial rights." *Id.*

If the Eleventh Circuit decision stands, a district court's decision to undercut a defendant's constitutional rights to due process and to the compulsory process to present witnesses in its favor will be undisturbed simply if a reviewing court of appeals, in its judgment, notes that it does not believe that the testimony of a government witness as either an expert or fact witness would be helpful to the defense, even though the sole witness to testify as to a fact was discredited by the government. That is not what the Constitution requires. This Court has made it pellucidly clear that criminal defense attorneys are given great latitude to make tactical decisions. *Harrington v. Richter*, 131 S. Ct. 770, 788-89 (2011) (quoting *Strickland v. Washington*, 466 U.S. 668 689 (1984) ("There are, however, 'countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.' Rare are the situations

in which the "wide latitude counsel must have in making tactical decisions" will be limited to any one technique or approach.").

Part and parcel with that maxim, is that the defense may have tactical reasons why it chooses to call a witness. *Richter*, 131 S. Ct. at 788-89 ("Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence, whether pretrial, at trial, or both."). This Court's precedent is devoid of any cases permitting a trial court to exclude the witness from testifying as a sanction for an inadvertent, technical violation of a discovery order. Here, the exclusion of Dr. Cody's testimony as an expert *or* fact witness left Mr. Yates with only Mr. Ward's discredited expert testimony that red grouper measure longer with their mouths open than with their mouths closed. It cannot be disputed that there would have been no surprise for the government to have *its own witness to testify*. Knowing that the district court precluded the defense from calling Dr. Cody to testify during the defense's case-in-chief, the government aggressively attacked the credibility of Mr. Ward, suggesting to the jury that because Mr. Ward had an "axe to grind" with the government, his testimony should not be credited. Mr. Yates was left with no other means to attack the government's contentions. The exclusion of Dr. Cody's testimony was a prejudicial abuse of discretion that requires a new trial.

To determine, as the Eleventh Circuit opined, that testimony from a government witness would not have been helpful flies in the face of the facts of this case and in the

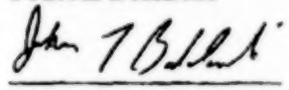
face of established Fifth and Sixth Amendment law from this Court. This Court's review of this case is crucially important, as there now exists a published Court of Appeals decision holding that an unintentional, technical noncompliance with a discovery order, for whatever reason, gives a trial court the discretion to order wholesale preclusion of the defense calling a witness in its case-in-chief, so long as a Court of Appeals speculates, in its *post hac* review of the record, it would not have been helpful to the defense.

CONCLUSION

As to Question One, because: (1) the vagueness of the term "tangible object" in section 1519 deprives individuals of fair notice as to the conduct prohibited under the statute; (2) the statute's vagueness and ambiguity permit arbitrary prosecutions; and, (3) the scope of the statute remains unsettled more than a decade after its enactment, further review is warranted by this Court.

As to Question Two, because the Court of Appeals, for a technical violation of a discovery order, infringed on Petitioner's rights to due process, compulsory process for obtaining witnesses in his favor, and to present a complete defense, further review of the opinion below is warranted. Petitioner Yates therefore respectfully requests that this Court grant his petition for a writ of certiorari.

Donna Lee Elm
Federal Defender



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OPPOSITION BRIEF

RESPONSE REQUESTED

ORIGINAL

No. 13-7451

Supreme Court, U.S.
FILED
MAR 14 2014
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IN THE SUPREME COURT OF THE UNITED STATES

JOHN L. YATES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's efforts to thwart a government investigation by dumping undersized fish at sea violated the criminal prohibition on "knowingly * * * destroy[ing] * * * [or] conceal[ing] * * * any * * * tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States," 18 U.S.C. 1519.

2. Whether the district court acted within its discretion in excluding at petitioner's trial certain expert testimony that petitioner failed to disclose to the government before trial, as required by Federal Rule of Criminal Procedure 16(b)(1)(C).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 733 F.3d 1059. The order of the district court (Pet. App. B1-B2) is not published in the Federal Supplement but is available at 2011 WL 3444093.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2013. The petition for a writ of certiorari was filed on November 13, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of disposing of undersized fish for the purpose of preventing the United States Coast Guard and the National Marine Fisheries Service (Fisheries Service) of the National Oceanic and Atmospheric Administration (NOAA) from exercising their lawful authority to take such property into their custody, in violation of 18 U.S.C. 2232(a); and of destroying, concealing and covering up an undersized fish with the intent to impede, obstruct, and influence the investigation and proper administration of the catching of red grouper under the legal minimum size limit, in violation of 18 U.S.C. 1519. He was sentenced to 30 days of imprisonment, to be followed by three years of supervised release. Pet. App. A6. The court of appeals affirmed. Id. at A1-A12.

1. Petitioner was the captain of the Miss Katie, a vessel engaged in commercial fish harvesting in the Gulf of Mexico. On August 23, 2007, John Jones, a field officer with the Florida Fish and Wildlife Conservation Commission who was deputized by the Fisheries Service to enforce federal fisheries laws, was on offshore patrol when he encountered the Miss Katie in federal waters. Pet. App. A2; 8/3/11 Tr. 69-71. Noting that the occupants of the Miss Katie were engaged in a commercial fish

harvest, Officer Jones boarded the vessel to inspect for gear, fishery, and boating-safety compliance. Pet. App. A2; 8/3/11 Tr. 71.

While on board, Officer Jones noticed several red grouper that appeared to be less than 20 inches long, the minimum legal limit for harvesting red grouper. Pet. App. A2; 8/3/11 Tr. 72. To determine whether the fish were of legal size, he measured the fish with their mouths closed and tails pinched, a protocol authorized by the governing federal regulation and which Jones determined was the most accurate way to measure red grouper. Pet. App. A2-A3 & n.2; 8/3/11 Tr. 60-61, 76, 80. Officer Jones gave petitioner the benefit of the doubt on fish that measured close to 20 inches but separated the fish that clearly measured less than 20 inches. In all, he determined that 72 red grouper measured less than 20 inches; Officer Jones placed them in wooden crates, instructed petitioner not to disturb them, and informed petitioner that the Fisheries Service would seize them upon the vessel's return to port. Pet. App. A3; 8/3/11 Tr. 81, 97, 101.

Petitioner did not comply. Instead, he directed Thomas Lemons, a crew member, to throw the undersized fish overboard. 8/3/11 Tr. 223. Lemons did so and, at petitioner's direction, the crew then took other red grouper and placed them in the crates that had held the undersized fish. Id. at 224.

Petitioner instructed Lemons to tell officials that the fish in the crates were the same fish that Officer Jones had identified as undersized. Pet. App. A3-A4; 8/3/11 Tr. 225.

On August 26, 2007, Special Agent James Kejonen of NOAA traveled to Cortez, Florida, to meet the Miss Katie, which had returned to port, and to investigate Officer Jones' report of undersized fish. Upon inquiring whether the fish that Officer Jones had identified as undersized were still on board, petitioner responded that they were. 8/3/11 Tr. 182-184. Officer Jones was then summoned to reinspect the fish at the dock. Using the same technique he previously employed, Officer Jones determined that, although some of petitioner's undersized fish had previously measured as little as 18 or 19 inches, none of the grouper unloaded at the dock were that small. And although most of the fish Officer Jones had measured at sea were between 19 and 19-1/2 inches long, the majority of the fish at the dock measured close to 20 inches. Id. at 121-124. Because Officer Jones suspected that the fish he measured at the dock were not the same fish he had measured onboard the Miss Katie, other officers interviewed crew member Lemons. Lemons eventually acknowledged that the undersized fish had been destroyed at petitioner's direction. Pet. App. A4; 8/3/11 Tr. 228-229.

2. Petitioner was charged with the offenses described above (and a third offense, of which he was acquitted at trial).

a. At trial, petitioner disputed whether the red grouper that he ordered thrown overboard were actually undersized because Officer Jones measured them with their mouths closed and not opened. He argued that it was possible that, if measured with their mouths open, they would have measured the legal size. Pet. App. A4-A5.

Before trial, both petitioner and the government had proffered experts who would testify about the proper method to measure red grouper. The district court conducted a Daubert hearing on the day before trial to evaluate the admissibility of both experts' testimony. The district court concluded that petitioner's expert, William Ward, a research director of the Gulf Fishermen's Association, could testify as a fish-measuring expert. Pet. App. A5; 8/2/11 Tr. 153. The court qualified the government's expert, Dr. Richard Cody, a research administrator with the Fish and Wildlife Research Institute, to testify about the amount a red grouper may shrink when placed on ice, but the court declined to rule on whether Dr. Cody could testify about the proper method of measuring a red grouper. Pet. App. A5; 8/2/11 Tr. 155, 164.

The government elected not to call Dr. Cody as an expert witness in its case-in-chief. After the government rested,

petitioner announced for the first time that he would call Dr. Cody as his own witness to testify about the length of a grouper with an open mouth versus a closed mouth. Pet. App. A5. The government objected, and the district court ruled that petitioner was precluded from calling Dr. Cody in his case-in-chief because petitioner had failed to notify the government of his intention to call Dr. Cody as an expert witness. 8/4/11 Tr. 51-54. Following that ruling, petitioner called Ward as his first witness. Ward testified as an expert that fish can shrink on ice and that grouper measure longer with their mouths open than with their mouths closed. Pet. App. A6. On cross-examination, the government elicited from Ward an admission that a seafood business that he operated had paid a $12,000 fine for dealing in gulf reef fish without a current permit. Ibid.; 8/4/11 Tr. 105-109.

b. At the conclusion of the government's case-in-chief, petitioner moved (as relevant here) for a judgment of acquittal on the count charging him with a violation of 18 U.S.C. 1519. That statute provides in relevant part that it is a criminal offense to "knowingly * * * destroy[], mutilate[], conceal[], [or] cover[] up * * * any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any

matter within the jurisdiction of any department or agency of the United States."

Petitioner argued that his destruction or concealment of fish could not violate Section 1519 because, in his view, the statute is merely a "documents offense," directed solely to the destruction of records and documents. 8/4/11 Tr. 38-40. The district court denied the motion. Id. at 46; see Pet. App. B1-B2. The district court observed that the Eleventh Circuit had held that, although Section 1519 was enacted as part of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley or Act), Pub. L. No. 107-204, § 802(a), 116 Stat. 800, which responded to concerns about corporate fraud and executive malfeasance, the statute's broad language was not confined to such offenses and that "Congress is free to pass laws with language covering areas well beyond the particular crisis du jour that initially prompted legislative action." Pet. App. B1-B2 (quoting United States v. Hunt, 526 F.3d 739, 744 (11th Cir. 2008)). The district court concluded that a reasonable jury could find that a person who throws a fish overboard in the circumstances of this case violates Section 1519. Id. at B2.

3. The court of appeals affirmed. Pet. App. A1-A12. As relevant here, the court rejected petitioner's argument that the term "tangible object," as used in Section 1519, embraces only tangible objects that relate to recordkeeping and does not

include fish. Id. at A9-A10. The court explained that undefined words (such as "tangible object" in Section 1519) are given their natural meaning and that "the plain meaning of the statute controls unless the language is ambiguous or leads to absurd results." Id. at A10 (quoting United States v. Carrell, 252 F.3d 1193, 1198 (11th Cir. 2001)). Applying those principles, the court concluded that a fish is a "tangible object." Ibid.

The court of appeals also rejected petitioner's argument that the trial judge abused his discretion by refusing to permit Dr. Cody to testify as a defense expert because petitioner failed to provide proper notice of his intent to present such testimony, as Federal Rule of Criminal Procedure 16(b)(1)(C) requires. The court found that sanctions for violations of discovery rules lie within the discretion of the trial court and that, to warrant reversal of the exercise of such discretion, the defendant must show prejudice to his substantial rights. The court of appeals held that it was unnecessary to decide whether the district court properly exercised its discretion in precluding Dr. Cody from testifying as a defense expert. Instead, the court of appeals found that Ward presented the same testimony that petitioner hoped to elicit from Dr. Cody and that petitioner's claimed inability to rehabilitate Ward's

credibility did not prejudice petitioner's substantial rights. Pet. App. A10-A12.

ARGUMENT

Petitioner primarily contends (Pet. 8-28) that the fish he ordered dumped at sea to thwart a government investigation are not "tangible object[s]" within the meaning of 18 U.S.C. 1519, which criminalizes intentional obstructive conduct involving "any record, document, or tangible object." The court of appeals correctly concluded that fish are "tangible object[s]," and petitioner does not contend that its decision conflicts with the decision of any other court of appeals. Petitioner also seeks this Court's review (Pet. 28-33) of the district court's exclusion of Dr. Cody's testimony -- a sanction that the district court imposed for petitioner's failure to comply with the Federal Rules of Criminal Procedure, and which the court of appeals concluded did not affect petitioner's substantial rights. That doubly factbound contention lacks merit and does not warrant this Court's review. The petition for a writ of certiorari should be denied.

1. Petitioner primarily contends that the fish he ordered dumped at sea are not "tangible object[s]" as that term is used in Section 1519. That is incorrect.

a. Petitioner was convicted under a provision that makes it a criminal offense to

> knowingly alter[], destroy[], mutilate[], conceal[], cover[] up, falsif[y], or make[] a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States * * * .

18 U.S.C. 1519. Petitioner does not dispute in this Court that he directed the destruction or concealment of the fish in question, that he did so in connection with a federal agency investigation, and that he acted with obstructive intent. He argues only that a fish is not a "tangible object." Petitioner is incorrect because a fish is indeed a "tangible object" within that term's ordinary and natural meaning. And to the extent the term's association with "record" and "document" informs the meaning of "tangible object," the established usage of those (or similar) terms together reveals that "tangible object" is given a broad construction that includes the fish at issue here.

i. As the court of appeals explained, where the meaning of a term is not further defined by the statute, the term should be given its "ordinary or natural meaning." Pet. App. A10 (citing Smith v. United States, 508 U.S. 223, 228 (1993) (relying on a dictionary definition to determine the ordinary meaning of the term "use")) Indeed, this Court recently applied that precept to interpret a neighboring provision of the very law that added Section 1519. See Lawson v. FMR LLC, No. 12-3 (Mar. 4, 2014) slip op. 9 (interpreting 18 U.S.C. 1514A(a)) ("In determining the meaning of a statutory provision, 'we look

first to its language, giving the words used their ordinary meaning.'") (quoting Moskal v. United States, 498 U.S. 103, 108 (1990)); see also Sandifer v. United States Steel Corp., 134 S. Ct. 870, 876 (2014) ("It is a 'fundamental canon of statutory construction' that, 'unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.'") (quoting Perrin v. United States, 444 U.S. 37, 42 (1979)); Burrage v. United States, 134 S. Ct. 881, 887 (2014) ("The Controlled Substances Act does not define the phrase 'results from,' so we give it its ordinary meaning.").

Here, the ordinary meaning of the adjective "tangible" is "[h]aving or possessing physical form." Pet. App. A10 (citing Black's Law Dictionary 1592 (9th ed. 2009)); see Webster's Third New International Dictionary 2337 (1993) (defining "tangible" as "able to be perceived as materially existent esp. by the sense of touch"). An "object" is, in the relevant sense, "a discrete visible or tangible thing." Id. at 1555. Moreover, because the adjective "any" precedes and modifies the series of nouns that includes "tangible object," the phrase "any * * * tangible object," taken as a whole, "suggests a broad meaning." Ali v. Federal Bureau of Prisons, 552 U.S. 214, 218-219 (2008); see United States v Gonzales, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (quoting

Webster's Third New International Dictionary 97 (1976)). The phrase "any * * * tangible object" thus naturally and unambiguously includes a fish.

ii. The reference to "tangible object" within the statutory context reinforces this conclusion. That term is used in parallel with "record" and "document" in the phrase "any record, document, or tangible object." Because the statute is concerned with acts intended to obstruct the "investigation or proper administration of any matter within [federal] jurisdiction," the broad triad of "any record, document, or tangible object" is naturally understood to refer to the wide variety of evidence generally regarded as germane to such "matter[s]." The triad is thus conceptually related to -- and textually parallels -- other provisions of law addressing the collection and preservation of evidence for official proceedings. For example, the discovery and inspection provisions of the Federal Rules of Criminal Procedure address "books, papers, documents, data, photographs, tangible objects, buildings or places." Fed. R. Crim. P. 16(a)(1)(E) (emphasis added). Likewise, the discovery provisions of the Federal Rules of Civil Procedure address disclosure of "[d]ocuments and [t]angible [t]hings" (Fed. R. Civ. P. 30(f)(2) (emphasis added)) or "documents or electronically stored information * * * or * * * tangible things" (Fed. R. Civ. P. 34(a)(1)(A)-(B)

(emphasis added)). If relevant to a court proceeding, a fish would plainly be discoverable as a "tangible object" or "tangible thing" under those provisions; correspondingly, its destruction or concealment is an offense under Section 1519 when undertaken to obstruct an official governmental matter.

b. Petitioner acknowledges (Pet. 25 & n.17) both that "any * * * tangible object" has been given its broad natural meaning in other cases and that the court of appeals' decision does not conflict with the decision of any other court of appeals. The government has found no decision endorsing petitioner's unnaturally narrow reading of the phrase "any * * * tangible object" as limited to "informational items" or "record-keeping modalities" (Pet. 17-18). There is therefore no division of authority for this Court to resolve.

Indeed, Section 1519 has been consistently applied to a variety of tangible objects (other than records and documents) that defendants destroyed, altered, or concealed with obstructive intent. See United States v. Perez, 603 F.3d 44, 45 (D.C. Cir. 2010) (washing cocaine powder down the sink); United States v. Vosburgh, 602 F.3d 512, 519, 521 (3d Cir. 2010) (destruction of computer hard drive and thumb drives to thwart execution of search warrant for child pornography), cert. denied, 131 S. Ct. 1783 (2011); United States v. Wortman, 488 F.3d 752, 752-753 (7th Cir. 2007) (destruction of compact disc

containing child pornography); United States v. Giuseppe Bottiglieri Shipping Co., No. 12-cr-57, 2012 WL 1899844, at *2 (S.D. Ala., May 24, 2012) (removing a pipe used to bypass vessel's pollution prevention system); United States v. Atlantic States Cast Iron Pipe Co., 612 F. Supp. 2d 453, 540 (D.N.J. 2009) (altering the condition of a cement mixer to conceal from investigators that a safety device had been bypassed); United States v Russell, 639 F. Supp. 2d 226, 230 (D. Conn. 2007) (destroying laptop computer containing child pornography).

c. Petitioner nonetheless contends that the decision below is incorrect, arguing that other canons of statutory construction suggest that a fish is not a "tangible object" for purposes of Section 1519.

i. Petitioner contends that the canon of noscitur a sociis requires that "tangible object" be given a common meaning with the immediately preceding words, "record" and "document," thus limiting it to tangible objects that are "somehow similar or related to documents and record-keeping modalities." Pet. 14. That is incorrect. As an initial matter, that canon of construction operates only to resolve ambiguity, see United States v. Stevens, 559 U.S. 460, 474-475 (2010), but "the phrase * * * at issue here contains little ambiguity * * * [given] the ordinary meaning of the[] words," ibid. See Schindler Elevator Corp. v. United States, 131 S. Ct. 1885, 1893

(2011) ("In interpreting a statute, [o]ur inquiry must cease if the statutory language is unambiguous.") (internal quotation marks and citation omitted); Ali, 552 U.S. at 227 ("[W]e are unpersuaded by petitioner's attempt to create ambiguity where the statute's text and structure suggest none.").

Moreover, petitioner's application of noscitur a sociis begs the question whether Congress intended "record" and "document" to limit the reach of "tangible object." As explained above, the customary legal usage of those (or similar) words in tandem suggests an intent to cover a broad category of relevant evidence, not a limited subset of documentary materials. Relatedly, petitioner's argument relies too heavily on "the immediately surrounding words, to the exclusion of the rest of the statute." Schindler, 131 S. Ct. at 1892. Section 1519 is concerned with acts undertaken "with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States." 18 U.S.C. 1519 (emphases added) Such language reveals a breadth of purpose that goes beyond a simple prohibition on document destruction. Cf. Ali, 552 U.S. at 226 (noting that, although customs and excise are mentioned twice in the statute at issue, "nothing in the overall statutory context suggests that customs and excise officers were the exclusive focus of the provision"). And,

contrary to petitioner's suggestion (Pet. 15-16), most of the unlawful acts in Section 1519 -- "alter[ing], destroy[ing], * * * conceal[ing], cover[ing] up" -- are as applicable to the full range of tangible objects as they are to records and documents.

ii. Petitioner's reliance (Pet. 14) on the caption of Section 1519 ("Destruction, alteration, or falsification of records in Federal investigations and bankruptcy") is also misplaced. "[T]he title of a statute and the heading of a section cannot limit the plain meaning of the text." Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R., 331 U.S. 519, 528-529 (1947). As this Court recently observed, headings are often "short-hand reference[s]" that do not substitute for or limit the text's detailed provisions. Lawson, slip op. 16 (citation omitted). Here, although the heading of Section 1519 refers only to "records," the statute's text makes clear that it reaches "any * * * document, or tangible object" as well.

iii. Petitioner also invokes (Pet. 16-17) the ejusdem generis canon of construction. That principle counsels that, where general words follow an enumeration of specific terms, the general words are read to embrace only other items similar to those expressly enumerated. See Garcia v. United States, 469 U.S. 70, 74 (1984). Petitioner would apply that canon by treating the term "tangible object" as a "catchall-like term"

that must be informed by the narrower terms "record" and "document." Pet. 16-17. That reasoning is unsound. Like the noscitur a sociis canon, "[t]he rule of ejusdem generis is no more than an aid to construction and comes into play only when there is some uncertainty as to the meaning of a particular clause in a statute." United States v. Turkette, 452 U.S. 576, 581 (1981) (citing Harrison v. PPG Indus., Inc., 446 U.S. 578, 588 (1980)); see Garcia, 469 U.S. at 74-75. Because there is no ambiguity in the meaning of "any * * * tangible object," resort to the ejusdem generis canon is inappropriate.

Moreover, the ejusdem generis canon is useful only to limit the meaning of a general term in light of distinctively specific terms that precede it. But here, no one of the operative terms -- "record, document, or tangible object" -- is any more or less specific than the others. All embrace a wide and somewhat overlapping variety of items. Accordingly, the term "tangible object" is not the "catchall-like term" petitioner claims it to be. Under the circumstances here, the more relevant rule of construction is "[t]he rule against superfluities" -- that "'[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" Hibbs v. Winn, 542 U.S. 88, 101 (2004) (quoting 2A Norman J. Singer, Statutes and Statutory Construction § 46.06, at 181-186 (rev. 6th ed. 2000)); see

Bailey v. United States, 516 U.S. 137, 146 (1995) ("We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning."). As one court construing Section 1519 has observed, if the term "tangible object" were limited to things akin to records and documents, it would "effectively render[] the term 'tangible object' superfluous and meaningless," Russell, 639 F. Supp. 2d at 238, a result that Congress would not have intended.

iv. Petitioner also invokes in passing (Pet. 17) the canon of expressio unius est exclusio alterius. That canon counsels that the enumeration of specific items in a statute implicitly excludes items not falling within the enumerated class. See, e.g., Marx v. General Revenue Corp., 133 S. Ct. 1166, 1181 (2013). Petitioner suggests that the fact that Section 1519 does not mention "evidence, property, [or] contraband" (Pet. 17 (emphasis omitted)) signals that it is not intended to reach the fish he that ordered dumped. Petitioner's argument lacks force because the term "any * * * tangible object" naturally includes fish; Congress had no need to specifically enumerate subcategories of tangible objects to make clear the breadth of its enactment.

v. Petitioner invokes various decisions of this Court construing unrelated statutory language (Pet. 12-13), but none justifies a departure from the plain meaning of Section 1519.

In Dolan v. United States Postal Service, 546 U.S. 481 (2006), this Court considered whether 28 U.S.C. 2680(b) -- which bars tort claims against the government "arising out of the loss, miscarriage, or negligent transmission of letters or postal matter" -- prohibited recovery of damages for injuries suffered by a homeowner who fell on mail left on her porch. The Court held that, as employed in the statute, the phrase "negligent transmission of * * * postal matter" did not extend to such injuries. The Court first recognized that the phrase in question was ambiguous, in that it "could embrace" the negligent act at issue. Dolan, 546 U.S. at 486. Resorting to noscitur a sociis, the Court found that the terms "loss" and "miscarriage" immediately preceding the words "negligent transmission" confined "transmission" to a failure to deliver mail in a timely manner and to the correct address (and, therefore, the injury at issue did not result from "transmission"). Id. at 486-487. Even this conclusion, the Court acknowledged, "would be less secure were it not for a precedent [that had] decisive weight" (id. at 487) -- a prior decision construing "negligent transmission" not to cover all negligence in the course of mail delivery

Here, by contrast, neither "context [nor] precedent require[s] a narrower reading" (Dolan, 546 U.S. at 486) of the term "any * * * tangible object" in Section 1519. A broad

construction of the term both is consistent with its "bare dictionary definition" (as petitioner concedes, Pet. 13) and accords with the broad sweep of the statute considered as a whole. And, further distinguishing Dolan, no prior judicial construction of the statute here counsels a narrower reading of "any * * * tangible object."

For somewhat different reasons, Zuni Public School District No. 89 v. Department of Education, 550 U.S. 81 (2007), does not assist petitioner. See Pet. 13. There, this Court observed that the meaning or ambiguity of certain words or phrases may only become evident when placed in context. Interpreting a provision using the word "percentile" in a highly technical statutory formula applied by an administrative agency, the Court noted that even "[t]he dictionary acknowledges that, when interpreting technical statistical language, the purpose of the exercise matters." 550 U.S. at 99. Consequently, the range of permissible regulatory applications of the provision using the term "percentile" was illuminated by the statutory context in which the term was used. Id. at 98-99.

Here, by contrast, Section 1519 is not technical, nor is it committed to agency interpretation, nor is the term "any * * * tangible object" context-dependent. And to the extent the term "any * * * tangible object" is informed by its usage in Section 1519, that context fully supports the

government's view. Tangible objects (whether "record-keeping modalities" (Pet. 18) or otherwise) are often relevant to "the investigation or proper administration of a[] matter within [federal] jurisdiction." Such objects can readily be "alter[ed], destroy[ed], mutilate[d], conceal[ed], cover[ed] up, [or] falsifie[d]." And those actions can (as here) be undertaken with obstructive intent.

d. Petitioner further contends (Pet. 18-22) that the legislative genesis of Section 1519 demands that its application be confined to the destruction or alteration of documents and similar items relevant to the investigation of white-collar crime. Petitioner's interpretive methods are unsound.

i. Section 1519 was enacted as part of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 802(a), 116 Stat. 800. The announced purpose of that wide-ranging Act is "[t]o protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes." Pmbl., 116 Stat. 745. Title VIII of the Act bears the short title "Corporate and Criminal Fraud Accountability Act of 2002." Sarbanes-Oxley § 801, 116 Stat. 800. Section 802 of the Act (which added 18 U.S.C. 1519, among other criminal provisions) is captioned "Criminal Penalties for Altering Documents." Id. § 802, 116 Stat. 800.

Petitioner argues (Pet. 20, 22) that those descriptions evince a concern about protecting investors from corporate and white-collar crime, and therefore Section 1519 should not apply outside the context of the destruction or alteration of documents and records in furtherance of such activities. "The short answer [to that contention] is that Congress did not write the statute that way." Russello v. United States, 464 U.S. 16, 23 (1983) (quoting United States v. Naftalin, 441 U.S. 768, 773 (1979)). As the Court explained in Russello, "legislative purpose is expressed by the ordinary meaning of the words used." Id. at 21 (quoting Richards v. United States, 369 U.S. 1, 9 (1962)). That is because the actual wording of the statute upon which both houses of Congress agreed is "the most reliable evidence" of legislative intent. Turkette, 452 U.S. at 593. Here, the text manifests a broad intent to prohibit the intentional and obstructive spoliation of evidence relevant to "the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States." 18 U.S.C. 1519 (emphases added). "[T]he broad language of [Section] 1519 * * * bears no hint of any limiting principle cabining [the statute] to corporate fraud cases, and Congress is free to pass laws with language covering areas well beyond the particular crisis du jour that initially

prompted legislative action." United States v. Hunt, 526 F.3d 739, 744 (11th Cir. 2008).

ii. Petitioner's reliance (Pet. 20-21) on the legislative history of Title VIII of Sarbanes-Oxley is likewise inappropriate. As this Court has repeatedly explained, "[i]n determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" Turkette, 452 U.S. at 580 (quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)).; see also Gonzalez, 520 U.S. at 6 ("Given the straightforward statutory command, there is no reason to resort to legislative history.").

In any event, Section 1519's legislative history is consistent with its plain language. Senator Leahy, who authored the obstruction provisions in Title VIII, explained in a "Section-by-Section Analysis" that Section 802 "would create a new 20-year felony which could be effectively used in a wide array of cases where a person destroys or creates evidence with the intent to obstruct an investigation or matter that is, as a factual matter, within the jurisdiction of any federal agency." 148 Cong. Rec. 14,448 (2002) (emphasis added). Although Senator Leahy referred at times to Section 1519 as a "new general anti-

shredding provision," he further explained that "Section 1519 is meant to apply broadly to any acts to destroy or fabricate physical evidence so long as they are done with the intent to obstruct, impede or influence the investigation or proper administration of any matter, and such matter is within the jurisdiction of an agency of the United States." Id. at 14,448-14,449 (emphasis added). Far from qualifying the broad language of Section 1519, Senator Leahy's explanation reinforces its scope.

Even if petitioner is correct that Section 1519 was conceived principally in response to white-collar crime and document destruction, that would not confine its application to that one form of obstructive conduct to the exclusion of obstructive acts like petitioner's. "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79-80 (1998).

e. There is no merit to petitioner's passing claim (Pet. 12, 23-24) that Section 1519 is so vague that it fails to afford defendants fair notice that it embraces the intentional destruction of fish to obstruct a federal agency's investigation. The Due Process Clause requires that a criminal

statute be sufficiently clear to give "a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." Hunt, 526 F.3d at 743 (internal quotation marks and citations omitted); see, e.g., Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982). "The touchstone of the inquiry is the meaning of the statute in light of common understanding and practice" (Hunt, 526 F.3d at 743), a matter rooted in the language of the statute itself. Ibid. As explained, the ordinary and natural meaning of "any * * * tangible object" includes fish; the term may be broad, but it is not vague.

Moreover, as this Court explained in Village of Hoffman Estates, a scienter requirement in a criminal statute "may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." 455 U.S. at 499. Here, whatever uncertainty there might be about whether destroying undersized fish is unlawful, there can be no question that petitioner's conduct -- undertaken in defiance of an enforcement official's direction to preserve the fish -- was unlawful because it was undertaken "knowingly" and with the specific "intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United

States." 18 U.S.C. 1519. The statute simply does not embrace innocent or inadvertent conduct.

Petitioner is mistaken to contend (Pet. 23-24 & n.14) that Bouie v. City of Columbia, 378 U.S. 347 (1964), requires a different result. In Bouie, a state criminal trespass law made punishable the entry on the premises of another after receiving fair notice to leave. This Court held that a judicial construction of the statute that expanded its scope to include the entirely different offense of remaining on the premises of another after receiving notice to leave violated due process because "[t]here was nothing in the statute to indicate that it also prohibited the different act of remaining on the premises." 378 U.S. at 355. Here, by contrast, petitioner was convicted of conduct -- destruction of a tangible object with obstructive intent -- that falls squarely within Section 1519. His conviction does not rest on an unforeseeable expansion of the statute's plain language like the one in Bouie.

f. Petitioner's amici contend that petitioner's conviction reflects "quintessential overcriminalization" (Cause of Action Amicus Br. 2) and "the overfederalization of traditionally state offenses" (NACDL Amicus Br. 2) Those objections are both irrelevant and unfounded. Apart from ensuring that Congress "act[s] within any applicable constitutional constraints in defining criminal offenses," this

Court does not pass judgment on the wisdom of the scope of criminal law. Liparota v. United States, 471 U.S. 419, 424 n.6 (1985). Rather, "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." Id. at 424 (citing United States v. Hudson, 11 U.S. (7 Cranch) 32 (1812)). In any event, petitioner's conduct was an entirely appropriate subject of federal criminal prosecution. He intentionally ordered the destruction of evidence relevant to a federal agency's investigation of a violation of federal law committed in federal waters, intending to thwart that federal investigation. Indeed, it would be surprising to discover that Congress did not intend to penalize such conduct under a statute making it a crime to "knowingly * * * destroy[] * * * any * * * tangible object with [obstructive] intent." 18 U.S.C. 1519.

Amici express a related concern (e.g., Cause of Action Amicus Br. 6-10) that Section 1519 prescribes potentially harsh penalties for obstructive conduct related to relatively minor matters. That concern is unfounded because Section 1519 establishes no minimum punishment. Although it has a relatively substantial statutory maximum punishment (20 years of imprisonment), that wide range within which a sentencing court may exercise its discretion accommodates the wide variation in

the gravity of the matters whose investigation a defendant's conduct might obstruct. Cf. Sentencing Guidelines §§ 2J1.2(c), 2X3.1(a) (linking the advisory Sentencing Guidelines range for certain obstructive conduct to the offense level that would apply to the matter whose investigation was obstructed). Petitioner's modest 30-day sentence aptly illustrates that district courts are sensitive to the context in which a Section 1519 defendant's obstruction occurs. There is no reason to treat petitioner's intentionally obstructive conduct as lawful.

g. Finally, petitioner's reliance (Pet. 22 n.12) on the rule of lenity is misplaced. As this Court has repeatedly emphasized, "the rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended." Maracich v. Spears, 133 S. Ct. 2191, 2209 (2013) (citation omitted). In this case, "there is no work for the rule of lenity to do." Ibid. The text of Section 1519 is unambiguous and leaves no doubt that petitioner's conduct was within its broad reach.

2. Petitioner also contends (Pet. 28-33) that the district court erred, and prejudiced petitioner's case, by not allowing petitioner to present Dr. Cody's expert testimony, notwithstanding petitioner's failure to provide timely notice of

his intent to do so as required by Federal Rule of Criminal Procedure 16(b)(1)(C). That factbound argument lacks merit.

The Rule provides in relevant part:

> The defendant must, at the government's request, give to the government a written summary of any testimony that the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence as evidence at trial, if * * * the defendant requests disclosure under subdivision (a)(1)(G) and the government complies. * * * This summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

Fed. R. Crim. P. 16(b)(1)(C). Petitioner does not dispute that he failed to comply with that obligation with respect to Dr. Cody.

As this Court has explained, "[t]he principle that undergirds the defendant's right to present exculpatory evidence is also the source of essential limitations on the right," Taylor v. Illinois, 484 U.S. 400, 410 (1988), and therefore it "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process," Rock v. Arkansas, 483 U.S. 44, 55 (1987) (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973)). Thus, a defendant's failure to follow "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence," Chambers, 410 U.S. at 302, may prompt the court to correspondingly curtail the defendant's right to present evidence. See Taylor, 484 U.S. at 412 ("The court's preclusion

sanction was an entirely proper method of assuring compliance with its order.") (citation omitted).

Here, petitioner challenges the district court's exclusion of Dr. Cody. But the court of appeals did not address that issue because it found no prejudice from the exclusion. There is no reason for this Court to address that issue in the first instance. "This Court . . . is one of final review, 'not of first view.'" FCC v. Fox Television Stations, Inc., 556 U.S. 502, 529 (2009) (quoting Cutter v. Wilkinson, 544 U.S. 709, 719, n. 7 (2005)).

In any event, it was within the district court's discretion to exclude expert testimony as a sanction for petitioner's failure to provide the notice required by Rule 16(b)(1)(C). See United States v. Lundy, 676 F.3d 444, 451 (5th Cir. 2012); United States v Hoffecker, 530 F.3d 137, 185-188 (3d Cir.), cert. denied, 555 U.S. 1049 (2008); United States v. Petrie, 302 F.3d 1280, 1288-1289 (11th Cir. 2002), cert. denied, 538 U.S. 971 (2003). First, although petitioner had subpoenaed Dr. Cody as a defense witness (8/4/11 Tr. 53-54), he neglected to proffer Dr. Cody as an expert witness until his case-in-chief, and petitioner never furnished the government with a written summary of Dr. Cody's anticipated testimony as required by Rule 16(b)(1)(C). See id. at 51. Moreover, at the stage of proceedings when the district court excluded Dr. Cody, the court

had not decided whether to allow Dr. Cody's fish-measuring testimony, but it had qualified petitioner's expert (Ward) to offer that testimony, see id. at 50-51. It was eminently sensible for the district court to allow petitioner to put on the testimony of his own expert, who had been properly disclosed and qualified as an expert on the relevant subject, rather than the (cumulative) testimony of Dr. Cody, who had been neither disclosed nor found qualified.

Finally, for the reasons given by the court of appeals (Pet. App. A12), there is no merit to petitioner's argument (Pet. 32-33) that he was prejudiced by the district court's refusal to permit him to offer Dr. Cody as an expert in addition to, and on the same subject as, Ward. Such a case-specific question of harmless error would not, in any event, warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 13-7451

IN THE SUPREME COURT OF THE UNITED STATES

JOHN L. YATES, PETITIONER

v.

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **BRIEF FOR THE UNITED STATES IN OPPOSITION,** via email and first-class mail, postage prepaid, this 14th day of March, 2014.

[See Attached Service List]

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March 14, 2014

Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Charlene Goodwin, Case Management Supervisor, Office of the Solicitor General, at (202) 514-8844, or email at **SupremeCtBriefs@USDOJ.gov.** Ms. Goodwin's phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

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REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM 2013

JOHN L. YATES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eleventh Circuit

REPLY TO UNITED STATES' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Reply to United States' Brief in Opposition For Writ of Certiorari 1

A. The plain meaning of the phrase "tangible object" cannot be discerned solely by consulting a dictionary without any consideration of its statutory context 2

B. The Eleventh Circuit's decision must be reversed. 5

C. This case is an excellent vehicle for this Court to decide the scope of "tangible object" within a criminal provision of the Sarbanes-Oxley Act of 2002. 10

Conclusion 12

TABLE OF AUTHORITIES

Cases	Page(s)
Abuelhawa v. United States, 556 U.S. 816 (2009)	9
Al Janko v. Gates, 741 F.3d 136 (D.C. Cir. 2014)	6
Bailey v. United States, 516 U.S. 137 (1995)	6
Begay v. United States, 553 U.S. 137 (2008)	8
Church of Holy Trinity v. United States, 143 U.S. 457 (1892)	9
City of Chicago v. Morales, 527 U.S. 41 (1999)	9
Davis v. Michigan Dept. of Treasury, 489 U.S. 803 (1989)	3
Federal Communications Comm'n v. AT&T, Inc., 131 S. Ct. 1177 (2011)	5
Freeman v. Quicken Loans, Inc., 132 S. Ct. 2034 (2012)	4, 7, 9
Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson, 559 U.S. 280 (2010)	4
Johnson v. United States, 559 U.S. 133 (2010)	5, 6
Johnson v. Zimmer, 686 F.3d 224 (4th Cir. 2012)	6
Nken v. Holder, 556 U.S. 418 (2009)	5
Lawson v. FMR LLC et al., 134 S. Ct. 1158 (2014)	1
Leocal v. Ashcroft, 543 U.S. 1 (2004)	5
McBoyle v. United States, 283 U.S. 25 (1931)	9
Perez v. Postal Police Officers Assoc., 736 F.3d 736 (6th Cir. 2013)	6
Robinson v. Shell Oil Co., 519 U.S. 337 (1997)	6
Sebelius v. Cloer, 133 S. Ct. 1886 (2013)	5

TABLE OF AUTHORITIES

Cases **Page(s)**

Schindler Elevator Corp. v. United States ex rel. Kirk, 131 S. Ct. 1885 (2011) . 5

Tyler v. Cain, 533 U.S. 656 (2001) . . 3

United States v. Costello, 666 F.3d 1040 (7th Cir. 2012) . 6

United States v. Williams, 553 U.S. 285 (2008) . 4

United States v. Yates, 733 F.3d 1059 (11th Cir. 2013) . 12

Zuni Public School Dist. No. 89 v. Department of Educ., 550 U.S. 81 (2007) . 7

Statutes

Sarbanes-Oxley Act of 2002, Pub. L. 107-204 (July 30, 2002) *passim*

18 U.S.C. § 924(e)(2)(B)(ii) . 8

18 U.S.C. § 1519 *passim*

28 U.S.C. § 2241(e)(2) . 6

31 U.S.C. § 3730(e)(4)(A) . 5

Other

Black's Law Dictionary (9th ed. 2009) . 3, 7

Webster's Third New International Dictionary (1993) . 3

REPLY TO UNITED STATES' BRIEF IN OPPOSITION FOR WRIT OF CERTIORARI

The important question presented to this Court boils down to whether a fish is a "tangible object" under the "anti-shredding" criminal provision of the Sarbanes-Oxley Act of 2002, entitled "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy." 18 U.S.C. § 1519; *see Lawson v. FMR LLC et al.*, 134 S. Ct. 1158, 1161 (2014) (explaining the purpose of the Sarbanes-Oxley Act of 2002 as follows, "To safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation, Congress enacted the Sarbanes-Oxley Act of 2002, 116 Stat. 745.").

Petitioner, now 62 years old, is a commercial fisherman who was convicted of one count of destroying an aggregate of three purportedly undersized red grouper fish in violation of section 1519, exposing him to a 20-year statutory maximum penalty. Relying on Black's Law Dictionary's definition of "tangible" as "having or possessing physical form," the Eleventh Circuit held that because a fish has or possesses a "physical form," it is therefore a "tangible object" under section 1519. The Eleventh Circuit made no attempt to derive the plain meaning of "tangible object" from the context of section 1519. As the Eleventh Circuit would have it, the Judiciary's role in ascertaining the plain meaning of a statutory phrase ceases once a dictionary has been consulted, leaving no need to utilize any contextual canons of statutory construction to determine the meaning of a phrase that Congress neglected to define.

This Court's intervention is necessary to both decide the scope of section 1519 and to maintain uniformity of its and the courts of appeals' decisions regarding the important question of statutory interpretation involved in discerning a statute's plain and ordinary meaning. The Eleventh Circuit's published decision grants a license to lower courts to adopt broad, non-contextual dictionary definitions in all cases where Congress left ambiguous terms undefined, even where the dictionary definitions of particular words do not fit within the context of a particular criminal statute. This, in turn, unreasonably expands the reach of a criminal statute, cedes more authority to the Executive Branch than Congress intended, and, even more, reduces the Judiciary's role in interpreting statutorily-undefined words and phrases to the rudimentary consultation of a dictionary.

A. **The plain meaning of the phrase "tangible object" cannot be discerned solely by consulting a dictionary without any consideration of its statutory context.**

Respondent's attempts to reconcile the Eleventh Circuit's published decision are unavailing and its cursory and dismissive application of the statutory contextual canons of construction underscores the need for this Court's intervention. Brief in Opp. at 14-18. Respondent uses Congress's failure to define the phrase "tangible object" as a sword to invoke a broad, dictionary definition of that two-word phrase, resulting in the expansion of the reach of a criminal statute to encompass everything "'[h]aving or possessing physical form," and "able to be perceived as materially existent esp. by the sense of touch," such as fish. Brief in Opp. at 11 (citing, *inter alia*, Black's Law

Dictionary 1592 (9th ed. 2009); Webster's Third New International Dictionary 2337 (1993)).

The "meaning of the statutory [phrase]" "tangible object" is "not, however, construe[d] . . . in a vacuum. Rather, [this Court] interpret[s] the words 'in their context and with a view to their place in the overall statutory scheme.'" *Tyler v. Cain*, 533 U.S. 656, 662 (2001) (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)). When "tangible object" is read within the context of a criminal provision of the Sarbanes-Oxley Act, entitled "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy," it is clear that tangible object is limited to those objects capable of storing records or documents. *See* 18 U.S.C. § 1519 (providing for 20-year statutory maximum penalty for destruction of "*any record, document, or tangible object* with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . ") (emphasis supplied).

Respondent further points to Congress's inclusion of the word "any" in section 1519's phrase "any record, document, or tangible object" as an indication that Congress intended that section 1519 broadly applies to fish. Brief in Opp. at 11-12. Specifically, Respondent argues that "'any * * * tangible object,' taken as a whole, 'suggests a broad meaning.'" Brief in Opp. at 11 (internal citation omitted, emphasis supplied). That "broad meaning" due to Congress's use of the word "any," Respondent concludes, "thus naturally and unambiguously includes a fish." Brief in Opp. at 12.

Respondent's argument that Congress's utilization of the word "any" stretches the reach of a statute in all circumstances has been squarely rejected in a recent unanimous decision of this Court. *See Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2042-44 (2012) (rejecting Petitioners' invitation to expand the reach of 12 U.S.C. § 2607(b) to a single settlement-service provider simply because Congress utilized the word "any" in the phrase: "any portion, split, or percentage, of any charge made or received for the rendering of a real estate settlement service . . . other than for services actually performed"). Moreover, in *Freeman*, this Court expressed the importance of analyzing statutory terms in their context, in order to ascertain Congress's "common 'core of meaning.'" *Id.* at 2042 (quoting *Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 289 n.7 (2010)). That is, this Court employed the commonsense contextual canon of *noscitur a sociis*, which "'counsels that a word is given more precise content by the neighboring words with which it is associated.'" *Id.* at 2042 (quoting *United States v. Williams*, 553 U.S. 285, 294 (2008)).[1]

Although Respondent would have it that Congress's use of the word "any" in section 1519 could include all "tangible object[s]," with no limitations of any kind, the *Freeman* Court rejected a similar argument, focusing on the statutory context of the phrase utilizing the word "any." *Id.* at 2042-44. If section 1519's phrase "any . .

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[1] Although Respondent similarly rejects the applicability of the *ejusdem generis*, and *expressio unius est exclusio alterius* canons of statutory construction, Petitioner maintains their applicability in determining the meaning of "tangible object" in the context of section 1519. *See* Pet. at 16-18.

tangible object" is read in *isolation* and given the broad dictionary definition of possessing "physical form," then fish are indeed "tangible objects," as are baseballs, desk chairs, and dogs. That fish, baseballs, desk chairs, and dogs possess "physical form" does not render them "any . . . tangible object" within the context of section 1519.

B. The Eleventh Circuit's decision must be reversed.

The Eleventh Circuit interpreted the phrase "tangible object" in a Black's Law Dictionary vacuum without ascertaining a more precise meaning of that phrase from the overall statutory context, which is contrary to decisions of this Court and other courts of appeals. This underscores the need for this Court's intervention in order to create uniformity in the law. *See Sebelius v. Cloer*, 133 S. Ct. 1886, 1893 (2013) (explaining that ordinary meaning of statutory words is to be "applied to the text of the statute"); *Federal Communications Comm'n v. AT&T, Inc.*, 131 S. Ct. 1177, 1182-83 (2011) ("The construction of statutory language often turns on context . ., which certainly may include the definition of related words. . . . [W]hen interpreting a statute . . . we construe language . in light of the terms surrounding it.") (citing *Johnson v. United States*, 559 U.S. 133, 138 (2010); *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004)); *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885, 1891 (2011) (interpreting a public disclosure provision of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A); explaining that statutory interpretation requires courts to place a dictionary-defined word or phrase's meaning into the "provision's 'entire text,' read as an 'integrated whole'") (internal citation omitted); *Nken v. Holder*, 556 U.S. 418, 426 (2009) (explaining that "statutory interpretation turns on 'the language itself, the

specific context in which that language is used, and the broader context of the statute as a whole'") (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)); *Bailey v. United States*, 516 U.S. 137, 145 (1995) ("We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme. The meaning of statutory language, plain or not, depends on context.") (internal citation and alterations omitted). Furthermore, this Court has explained, "[W]e do not assume that a statutory word is used as a term of art where that meaning does not fit. Ultimately context determines meaning." *Johnson*, 559 U.S. at 139 (construing, based on the overall context of the statute, the meaning of "physical force" more narrowly than dictionary definitions).[2]

The Eleventh Circuit did not analyze the phrase "tangible object" within the overall statutory context of section 1519. This was fatal because its ambiguity "only

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[2] Indeed, several courts of appeals have similarly deduced a statutory phrase's plain meaning after looking at the context of that phrase within the statute. *See, e.g.*, *Al Janko v. Gates*, 741 F.3d 136, 141 (D.C. Cir. 2014) (interpreting statutory phrase "the United States," as used in 28 U.S.C. § 2241(e)(2), is "informed by the context in which the words appear," and noting "[C]iting to dictionaries creates a sort of optical illusion, conveying the existence of certainty – or 'plainness' – when appearance may be all there is.") (internal citation omitted); *Perez v. Postal Police Officers Assoc.*, 736 F.3d 736, 741 (6th Cir. 2013) (explaining that "broad [dictionary] definitions" do not end a "plain meaning analysis . We discover a statute's plain meaning by looking at the language and design of the statute as a whole.") (internal citation and quotation omitted); *Johnson v. Zimmer*, 686 F.3d 224, 233 (4th Cir. 2012) (rejecting "expansive" dictionary definition of an undefined statutory word, explaining that it is a "cardinal rule of statutory interpretation that 'statutory language must be read in context [because] a phrase gathers meaning from the words around it") (internal quotation and citation omitted); *United States v. Costello*, 666 F.3d 1040, 1044 (7th Cir. 2012) ("Dictionary definitions are acontextual, whereas the meaning of sentences depends critically on context, including all sorts of background understandings.").

become[s] evident when placed in context" of the remainder of section 1519. *Zuni Public School Dist. No. 89 v. Department of Educ.*, 550 U.S. 81, 98-99 (2007). Employing the commonsense contextual canon of *noscitur a sociis* gives a "more precise content" of the phrase "tangible object" when viewed in the context of the "neighboring words" with which it is "associated." *Freeman*, 132 S. Ct. at 2042.

Section 1519 prohibits the destruction of "a record, document, or tangible object " 18 U.S.C. § 1519. Examining the ordinary meanings of "record" and "document" to discern a "more precise" meaning of "tangible object" is thus necessary. After initially consulting the dictionary definitions of "record" and "document," we look to the context of the statute to determine "a more precise content" of "tangible object."

Black's Law Dictionary defines "document" as follows: "1. *Something tangible on which words, symbols, or marks are recorded.* 2. (pl.) The deeds, agreements, title papers, letters, receipts, and other written instruments used to prove a fact." Black's Law Dictionary 555 (9th ed. 2009) (emphasis supplied). Black's Law Dictionary defines "record" as follows:

> 1. A *documentary account* of past events, usu. designed to memorialize those events. 2. Information that is *inscribed on a tangible medium or that, having been stored in an electronic or other medium*, is retrievable in perceivable form.

Black's Law Dictionary 1387 (9th ed. 2009) (emphasis supplied). Thus, after determining the plain and ordinary meanings of the neighboring words of "record" and "document," it is readily discernible that the "common core" and "more precise" meaning of the statutory phrase "tangible object" is that the tangible object (like

"record" and "document") must be something that is capable of storing records or documents. To say otherwise would absurdly extend the reach of section 1519 to everything containing "physical form." That, in turn, would give the Executive Branch broad authority to utilize the severe penalties set forth in section 1519 to encompass everything containing "physical form," such as a fish.[3] This could not have been Congress's intent when drafting section 1519, entitled,"Destruction, alteration, or falsification of *records* in Federal investigations and bankruptcy." 18 U.S.C. § 1519 (emphasis supplied).

A fish is no more a "record" or "document" than is a baseball, a desk chair, or a dog, which, as both Respondent and the Eleventh Circuit would have it, all fit within a "broad triad" of "any record, document, or tangible object." Brief in Opp. at 12. The Eleventh Circuit's decision should not be left undisturbed because it gives "'improbable breadth'" to the "Anti-Shredding Provision" of the Sarbanes-Oxley Act of 2002.

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[3] Respondent is effectively treating "tangible object" as a catchall provision, even though a record or document can be in the form of a tangible object. That construction would essentially write "record" and "document" out of section 1519. Indeed, in *Begay v. United States*, 553 U.S. 137 (2008), notwithstanding the broad language of what had, until then, been known as "the catch-all provision" of 18 U.S.C. § 924(e)(2)(B)(ii), this Court, applying the rules of statutory construction, concluded that "the provision's listed examples – burglary, arson, extortion, or crimes involving the use of explosives – illustrate the kinds of crimes that fall within the statute's scope." *Id.* at 142. Their presence indicates that the statute covers only similar crimes, rather than *every* crime that "presents a serious potential risk of physical injury to another." *Id.* This Court continued, "If Congress meant the latter, *i.e.*, if it meant the statute to be all-encompassing, it is hard to see why it would have needed to include the examples at all." *Id.* Here, there would have been no purpose for Congress to have included "record" or "document" in section 1519 if "tangible object" were meant to apply as broadly as Respondent and the Eleventh Circuit suggest.

Freeman, 132 S. Ct. at 2041 (quoting *Abuelhawa v. United States*, 556 U.S. 816, 823 n.3 (2009)).

The broad and literal interpretation of the undefined phrase "tangible object" to include "fish" also produces the "absurd" result here; that is, a conviction under the Sarbanes-Oxley Act of 2002 for destroying purportedly undersized fish, which were the subject of a civil fishing citation. *See, e.g., Church of Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) (noting that "frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of ... the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act").

At best, fish fit "awkwardly with the language Congress chose" for section 1519. *Dowling v. United States*, 473 U.S. 207, 218 (1985). At a minimum, as amicus curiae aptly argues, the rule of lenity should be applied to the construction of this ambiguous criminal statute, yielding Petitioner relief from application of this statute to his alleged conduct of disposing of purportedly undersized fish. *Id.* at 228-29; Brief for Cause of Action as Amicus Curiae in Support of Petitioner, at 9-10.[4]

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[4] On a Constitutional level, it neglects to give individuals "fair warning . . of what the [criminal] law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle v. United States*, 283 U.S. 25, 27 (1931); *see also City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (explaining that a criminal law violates the Due Process Clause "if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits...." (internal citation and quotation omitted).

C. This case is an excellent vehicle for this Court to decide the scope of "tangible object" within a criminal provision of the Sarbanes-Oxley Act of 2002.

This case perfectly illustrates the flaw and danger of applying, without more, a broad dictionary definition to a statutory phrase that Congress neglected to define. The Eleventh Circuit endorsed the Executive Branch's broad utilization of the statutorily undefined phrase "tangible object." The broad application of section 1519's phrase "tangible object" resulted in Petitioner's current term of criminal punishment for a federal felony conviction arising from a Florida Fish and Wildlife Commission civil fishing citation issued 985 days (2 years, 8 months, and 11 days) prior to the grand jury's return of the indictment in this case.[5]

If tangible object is read within its context of "any record, document, or tangible object," the Executive Branch would not have had the authority to criminally prosecute Petitioner under section 1519. Petitioner has asserted that section 1519 did not

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[5] Amici curiae make cogent arguments explaining the importance of granting the writ of certiorari in this case, as this case presents an "ideal vehicle" for this Court to decide an important issue of statutory interpretation. The overarching theme of both Cause of Action and the National Association of Criminal Defense Lawyers' briefs reflect the strong sense that utilization of the "Anti-Shredding Provision" of the Sarbanes-Oxley Act of 2002 to prosecute the purported destruction of fish by a "captain for hire" on a commercial fishing vessel stretches the reach of a criminal law to unreasonable lengths, resulting in "overcriminalization," "overfederalization," and the "significant risk of Executive Branch Overreach." Amicus Curiae Brief of the National Association of Criminal Defense Lawyers, at 6-12; Amicus Curiae Brief of Cause of Action, at 2-6.

encompass the destruction of purportedly undersized fish in the district court, circuit court of appeals, and now this Court.

The issue has been thoroughly preserved, developed, and briefed in the courts below, providing this Court with a complete record to decide this important issue. Petitioner thus asks this Court to issue a writ of certiorari to address an important issue of statutory construction regarding the scope of 18 U.S.C. § 1519.

CONCLUSION

For the reasons stated above and in Mr. Yates's petition for writ of certiorari, the Court should issue a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit in *United States v. Yates*, 733 F.3d 1059 (11th Cir. 2013). *See* S. Ct. R. 10(c).

Donna Elm
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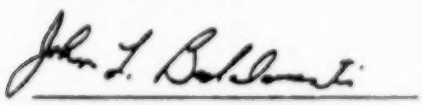

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AMICUS CURIAE BRIEF

No. 13-7451

IN THE

Supreme Court of the United States

JOHN L. YATES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR CAUSE OF ACTION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. Misapplication of Sarbanes-Oxley's "Anti-Shredding Provision," 18 U.S.C. § 1519, Presents Significant Risk Of Executive Branch Overreach 2

II. This Case Is An Ideal Vehicle For This Court To Address This Critical Issue Without Further Delay 6

CONCLUSION 10

TABLE OF AUTHORITIES

CASES: **Page**

Abuelhawa v. United States,
556 U.S. 816 (2009) 9, 10

Dowling v. United States,
473 U.S. 207 (1985) 9, 10

Simpson v. United States,
435 U.S. 6 (1978) 9

Moncrieffe v. Holder,
133 S. Ct. 1678 (2013) 8

United States v. United Continental Tuna Corp.,
425 U.S. 164 (1976) 8

Williams v. United States,
458 U.S. 279 (1982) 2

STATUTES:

Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745 2

§ 802 2

15 U.S.C. § 78ff(a) 3

16 U.S.C. § 374 5

16 U.S.C. § 1857(1)(A) 7

16 U.S.C. § 1857(1)(E) 7

16 U.S.C. § 1857(1)(G) 7

16 U.S.C. § 1858 7

16 U.S.C. § 1859(a) 7

16 U.S.C. § 1859(b) 7

18 U.S.C. § 711 5

18 U.S.C. § 1519 ..... *passim*

18 U.S.C. § 2232(a) 4, 8, 9

REGULATION:

50 C.F.R. 622.7(d)(2)(ii) 7

LEGISLATIVE HISTORY:

S. Rep. No. 107-146 (2002) 3, 4, 6, 10

S. Rep. No. 107-205 (2002) 2

OTHER AUTHORITIES:

John Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, The Heritage Foundation, Legal Memorandum No. 26 (2008), *available at* http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes 5

Barnini Chakraborty, 'Excessive': Marine biologist ends 7-year legal battle with feds over feeding whales, FOXNEWS.COM (Jan. 17, 2014), http://www.foxnews.com/politics/2014/01/17/over-criminalized-scientist-settles-7-year-legal-nightmare-with-feds-over/ (accessed Feb. 4, 2014) 4

Gary Fields & John Emshwiller, *As Criminal Laws Proliferate, More Are Ensnared,* WALL ST. J., July 23, 2011, *available at* http://online.wsj.com/news/articles/SB10001424052748703749504576172714184601654 5

Southeast Region Magnuson–Stevens Act Penalty Schedule, available at http://www.gc.noaa.gov/documents/gces/2-USFisheries/SE_msa_comm_rec_6-03.pdf 1, 7

Steven K. Smith & Mark Motivans, Bureau of Justice Statistics, *Compendium of Criminal Justice Statistics, 2004*, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cfjs04.pdf 6

INTEREST OF THE *AMICUS CURIAE*[1]

The *amicus curiae*, Cause of Action, is a nonprofit, nonpartisan organization that uses investigative, legal, and communications tools to educate the public on how government accountability and transparency protects taxpayer interests and economic opportunity. As part of this mission, Cause of Action works to expose and prevent the Executive Branch's misuse of discretionary power.

As part of its mission, Cause of Action devotes significant attention to highlighting the problems of overcriminalization and government overreach. The decision below, if allowed to stand, implicates both of those concerns, and accordingly this case is of great interest to *amicus*.

SUMMARY OF ARGUMENT

Petitioner John L. Yates allegedly threw overboard approximately six dozen red grouper that were too short by an inch or less, thereby making them unavailable for inspection by the National Marine Fisheries Service ("Fisheries Service"). Normally, this conduct would result in a civil fine or permit sanctions.[2] The United States Court of Appeals for the Eleventh Circuit, however, held that

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and neither the parties nor their counsel, nor anyone except *amicus* and its counsel, financially contributed to preparing this brief.

[2] Southeast Region Magnuson–Stevens Act Penalty Schedule, *available at* http://www.gc.noaa.gov/documents/gces/2-USFisheries/SE_msa_comm_rec_6-03.pdf (noting that "Violations Regarding Failing to Make Fish or Documents Available for Inspection" warrants a fine beginning at $500 or permit sanctions).

this conduct violates Sarbanes-Oxley's "anti-shredding" provision, 18 U.S.C. § 1519, which carries a sentence of up to 20 years in prison.

This is quintessential overcriminalization. The reasoning underlying the Eleventh Circuit's opinion will continue to "make a surprisingly broad range of unremarkable conduct a violation of federal law." *Williams v. United States*, 458 U.S. 279, 286 (1982). This Court should grant certiorari and properly limit the scope of Section 1519 to halt the government's unlawful overreach.

ARGUMENT

I. Misapplication of Sarbanes-Oxley's "Anti-Shredding Provision," 18 U.S.C. § 1519, Presents Significant Risk Of Executive Branch Overreach

In the wake of several major corporate and accounting scandals, Congress passed the Sarbanes-Oxley Act of 2002 "[t]o protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws." Pub. L. No. 107–204, 116 Stat. 745, 745.[3] As part of Sarbanes-Oxley, Congress enacted two new provisions under the heading "Criminal Penalties for *Altering Documents*." *Id.* § 802, 116 Stat. 800 (emphasis added). This case concerns the first of those provisions, 18 U.S.C. § 1519 ("Section 1519"), entitled "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy." Described in the Senate Report as an "anti-shredding

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[3] Sarbanes-Oxley was also intended to "address the systemic and structural weaknesses affecting our capital markets." S. Rep. No. 107-205 (2002).

provision,"[4] Section 1519 criminalizes knowingly destroying or concealing a "record, document or tangible object" with the intent to "impede, obstruct, or influence" a government investigation.[5] Violators face up to 20 years in prison – the same sentence for knowingly violating serious securities laws. *Compare* 18 U.S.C. § 1519 (providing that a person who violates this provision "shall be . . . imprisoned not more than 20 years"), *with* 15 U.S.C. § 78ff(a) (providing that anyone who knowingly violates the Securities Exchange Act shall be "imprisoned not more than 20 years").

The legislative history of Section 1519 emphasizes that it was intended to cover document-destruction offenses that were *not* adequately prohibited by existing law. The Senate Report explains that Section 1519 was to "close loopholes in the existing criminal laws relating to the destruction or fabrication of evidence and the preservation of financial and audit records." S. Rep. No. 107-146 (2002). Those "ambiguities and technical limitations" in pre-Sarbanes-Oxley federal law, the Report concluded, had contributed to the Enron scandal.[6]

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[4] S. Rep. No. 107–146, at 14 (2002).

[5] The full text of Section 1519 is: "Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both."

[6] S. Rep. 107–146 at 14 (2002).

However, there was no such gap for property (including fish) that was subject to an authorized search and seizure by the government. "[B]efore, during, or after any search for or seizure of property," federal law already prohibited "tak[ing] any action," or "attempt[ing] to . . . take any action, for the purpose of preventing or impairing the Government's lawful authority to take such property into its custody or control." 18 U.S.C. § 2232(a). Violating that provision carries a 5-year prison sentence. *Id.*

Nevertheless, the government has come to use Section 1519 as far more than a gap-filler to cover the destruction of corporate documents. Rather than employing Section 1519 as a shield to protect the citizenry from true acts of corporate and financial criminality, the government uses it as a sword ruthlessly to attack people for petty offenses.[7]

The government has relied on the notion that virtually anything can lead to the "investigation" of a "matter within the jurisdiction of [a] department or agency of the United States," within the meaning of

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[7] For example, Nancy Black, a marine biologist, was indicted under Section 1519. *See* Indictment at 4, United States v. Nancy Black, No. 5:12-cr-00002-EJD (N.D. Cal. 2012). The government's original charges could have resulted in up to 27 years in prison, a $700,000 fine and forfeiture of her research vessel. Eventually, Ms. Black pleaded guilty to a single misdemeanor charge of violating a Marine Mammal Protection Act regulation prohibiting "feeding" for which she received a $12,500 fine, 3 years of probation, and 300 hours of community service. *See* Barnini Chakraborty, *'Excessive': Marine biologist ends 7-year legal battle with feds over feeding whales*, FOXNEWS.COM (Jan. 17, 2014), http://www.foxnews.com/politics/2014/01/17/over-criminalized-scientist-settles-7-year-legal-nightmare-with-feds-over/ (accessed Feb. 4, 2014).

Section 1519. The expansion of federal administrative law has resulted in a multitude of agencies empowered to investigate alleged violations of countless federal regulations. John Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, The Heritage Foundation, Legal Memorandum No. 26 (June 16, 2008), *available at* http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes; Gary Fields & John Emshwiller, *As Criminal Laws Proliferate, More Are Ensnared,* WALL ST. J., July 23, 2011, http://online.wsj.com/news/articles/SB10001424052748703749504576172714184601654. Under the Eleventh Circuit's reasoning, destroying evidence of a misdemeanor regulatory violation subjects a person to prosecution under Section 1519. Accordingly, a person who misappropriates the image of "Smokey Bear" or engages in unauthorized bathing within Hot Springs National Park could face up to 20 years in prison. *See* 18 U.S.C. § 711; 16 U.S.C. § 374.

Further, each year thousands of people are cited for traffic-related offenses on federal property. Steven K. Smith & Mark Motivans, Bureau of Justice Statistics, *Compendium of Federal Justice Statistics, 2004*, at 17 tbl.1.1, http://bjs.ojp.usdoj.gov/content/pub/pdf/cfjs04.pdf. As a result, disposing of evidence of countless low-grade regulatory offenses—including traffic offenses on the Woodrow Wilson Bridge or George Washington Parkway—may violate Section 1519. Nothing in the Eleventh Circuit's opinion cabins Section 1519 to prevent the government from prosecuting a person for destroying evidence of a federal *infraction*. Such an interpretation clearly contravenes Congress's intent Section 1519 be used "to ensure that individuals who

destroy evidence with the intent to impede a pending or future *criminal* investigation are punished." S. Rep. No. 107-146, at 27 (2002) (emphasis added).

Therefore, given the increasingly broad reach of the federal government, it is critical for this Court to properly confine the scope of Section 1519 in order to prevent unwarranted expansion.

II. This Case Is An Ideal Vehicle For This Court To Address This Critical Issue Without Further Delay

A jury convicted Mr. Yates, a commercial fisherman, of violating Section 1519 for throwing undersized fish overboard with the intent to hinder a *civil* investigation by the National Marine Fisheries Service into whether he violated federal regulations by catching grouper that were less than 20 inches long. Catching undersized red grouper is not a criminal offense.[8] And under the federal fisheries laws, impeding a search for undersized fish, or for evidence of other regulatory violations—even *forcibly resisting* such a search—is a federal misdemeanor punishable by at most six months' imprisonment, except in the most aggravated cases involving a dangerous weapon or risk of bodily injury. *See* 16

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[8] *See* 16 U.S.C. § 1859(a). The restrictions on possessing undersized red grouper appear in 50 C.F.R. 622.7(d)(2)(ii), (n) (2007). Violating those regulations is unlawful, 16 U.S.C. § 1857(1)(A), (G), but not criminally punishable, *see id.* § 1859(a). Violations instead result only in civil penalties and sanctions against the defendant's fishing permit. 16 U.S.C. § 1858. Mr. Yates's alleged first-time violation of the undersized-fish rules would ordinarily warrant a fine of $500-50,000 and permit sanctions of 0-45 days. Southeast Region Magnuson–Stevens Act Penalty Schedule, *available at* http://www.gc.noaa.gov/documents/gces/2-USFisheries/SE_msa_comm_rec_6-03.pdf.

U.S.C. §§ 1857(1)(E), 1859(a), (b). Yet the government circumvented these limitations on punishment by proceeding under Section 1519, which allowed it to seek up to a 20-year sentence.

In affirming Mr. Yates's conviction, the Eleventh Circuit focused on whether a fish can be regarded as a "tangible object," without considering the various canons of statutory construction that limit Section 1519's reach and rationalize its interpretation. Section 1519 cannot reasonably be read to encompass every imaginable tangible object that could conceivably constitute evidence of a regulatory violation and thus absurdly transform a civil violation into a twenty-year felony. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1691 (2013) ("[T]here is a more fundamental flaw in the Government's approach: It would render even an undisputed misdemeanor an aggravated felony. This is 'just what the English language tells us not to expect,' and that leaves us 'very wary of the Government's position.'") (citation omitted).

The Eleventh Circuit first erred by interpreting Section 1519 in a way that results in the implied repeal of other laws that carry lesser penalties. Under 18 U.S.C. § 2232(a), entitled "Destruction or Removal of Property to Prevent Seizure," a person faces up to 5 years in prison for knowingly destroying, damaging, or disposing of property that the government has the authority to search or seize. By concluding that Mr. Yates's disposal of fish with the purpose of preventing the government from conducting an authorized search fell within the ambit of Section 1519, the Eleventh Circuit implicitly held that Section 1519 encompasses *all* conduct

criminalized by § 2232(a). That makes Section 2232(a) either completely superfluous, in violation of the "cardinal principle of statutory construction that repeals by implication are not favored," *United States v. United Cont'l Tuna Corp.*, 425 U.S. 164, 168 (1976), or a prohibited double punishment for the same offense, in violation of this Court's "steadfast[] insiste[nce] that 'doubt will be resolved against turning a single transaction into multiple offenses.'" *Simpson v. United States*, 435 U.S. 6, 15 (1978).

Further, permitting the government to prosecute under Section 1519 (as broadly interpreted) rather than the more pertinent statutes with lesser penalties is contrary to this Court's decisions in *Dowling v. United States*, 473 U.S. 207 (1985) and *Abuelhawa v. United States*, 556 U.S. 816 (2009). *Dowling* instructed that when a defendant's misconduct "fits but awkwardly with the language Congress chose [for a statute]," courts should carefully discern the statute's objective intent and purpose. *Dowling*, 473 U.S. at 218. This includes "consider[ing] whether the history and purpose of [of the statute] evince a plain congressional intention to reach" the misconduct, and invoking the rule of lenity. *Id.*

Here, at most, Mr. Yates's conduct "fits awkwardly" with the language Congress used in Section 1519. Throwing undersized fish overboard to hinder an investigation by the Fisheries Service is better described as "failing to make fish . . . available for inspection" under the Magnuson-Stevens Act[9] or

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[9] *See* Southeast Region Magnuson–Stevens Act Penalty Schedule, *available at* http://www.gc.noaa.gov/documents/gces/2-USFisheries/SE_msa_comm_rec_6-03.pdf (noting penalties for

even "disposing" (word used in § 2232(a)), rather than the verbs "alter[ing], destroy[ing], mutilat[ing], conceal[ing], cover[ing] up, falsify[ing], or mak[ing] a false entry in" Congress chose for Section 1519.

Further, it is unlikely that Congress intended Section 1519 to cover the disposal of undersized fish, given that it would converts a misdemeanor into a felony. *See Abuelhawa*, 556 U.S. at 822–23 ("Given the [Controlled Substances Act's] distinction between simple possession and distribution, and the background history of these offenses, it is impossible to believe that Congress intended 'facilitating' to cause that twelve-fold quantum leap in punishment for simple drug possessors.").

Section 1519's legislative history also demonstrates that it does not encompass the disposal of fish. The purpose of the statute was to ensure that individuals who hinder criminal investigations into corporate malfeasance by destroying evidence receive a punishment that reflects the severity of the underlying crime. *See* S. Rep. No. 107-146 (2002) (noting that Section 1519 addresses the problem of "certain current provisions mak[ing] it a crime to persuade another person to destroy documents, but not [making it] a crime to actually destroy the same documents yourself").

Finally, applying the rule of lenity leads to the conclusion that Section 1519 does not reach Mr. Yates's conduct. Under this principle, the language in statute must "plainly and unmistakably" cover a defendant's conduct before a court will impose

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"Violations Regarding Failing to Make Fish or Documents Available for Inspection").

criminal sanction. *Dowling*, 473 U.S. at 228. Such is not the case here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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February 5, 2014

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
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No. 13-7451

IN THE
Supreme Court of the United States

JOHN L. YATES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

I. PETITIONER'S CONVICTION UNDER 18 U.S.C. §§ 1519 AND 2232 THROUGH HIS CONDUCT ABOARD THE *MISS KATIE*, EXEMPLIFIES OVERCRIMINALIZATION STEMMING FROM AN UNCONSTITUTIONAL EXECUTIVE EXPANSION OF THE LAW. 5

A. THE OVERCRIMINALIZATION AND OVERFEDERALIZATION PHENOMENA. 6

B. EXECUTIVE EXPANSION OF 18 U.S.C. § 1519 TO INCLUDE RED GROUPER FURTHERS THE OVERCRIMINALIZATION EPIDEMIC. 9

C. NO REASONABLE JURY COULD HAVE CONVICTED THE PETITIONER UNDER § 2232 BECAUSE THE GOVERNMENT FAILED TO MEET ITS BURDEN OF PROOF. 13

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

CASES

Beecham v. United States,
511 U.S. 368 (1994) 10

Bouie v. City of Columbia,
378 U.S. 347 (1964) 11

Circuit City Stores, Inc. v. Adams,
532 U.S. 105 (2001) 10

Cosby v. Jones,
682 F.2d 1373 (11th Cir. 1982) 13

Edison v. Douberly,
604 F.3d 1307 (11th Cir 2010) 11

Francis v. Franklin,
471 U.S. 307 (1985) 13

In re Winship,
397 U.S. 358 (1970) 13

Sykes v. United States,
131 S. Ct. 2267 (2011) (Scalia, J.,
dissenting) 9

United States v. Perez-Tosta,
36 F.3d 1552 (11th Cir. 1994) 13

United States v. Taylor,
144 F.3d 1423 (11th Cir. 1998) 13

STATUTES

18 U.S.C. § 1519 (2012)..... passim

18 U.S.C. § 2232 (2012)..... 6, 7, 13, 14

OTHER AUTHORITIES

148 Cong. Rec. S7418-01 (2002) 10

Brian Walsh and Tiffany Joslyn, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law*..... 3, 4

Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 Geo. L.J. 1435, 1437 (2009)..... 5

James A. Strazzella, *The Federalization of Criminal Law,* Criminal Justice Section, American Bar Association, 1998 7

John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes,* Heritage Foundation, Legal Memo. No. 26, June 16, 2008..... 8

National Institute of Justice: Collateral Consequences, available at http://www.abacollateralconsequences.org/ 15

Overcriminalization and the Constitution, Heritage Foundation Legal Memo. No. 64, April 13, 2011..... 11

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The National Association of Criminal Defense Lawyers, Inc. submits the following Certificate of Interested Persons and Corporate Disclosure Statement pursuant to FRAP 26.1. The following persons and entities have an interest in the outcome of this appeal in addition to those previously identified by the parties in their briefs:

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National Association of Criminal Defense Lawyers, Inc.
William N. Shepherd
Seth J. Welner

The National Association of Criminal Defense Lawyers, Inc. is a not-for-profit corporation headquartered in Washington, DC. It has no parent corporation and no stock.

INTEREST OF AMICUS CURIAE

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers ("NACDL") as *amicus curiae* in support of the Petitioner in *United States v. Yates*, on petition for writ of certiorari.[1]

NACDL, a non-profit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's approximately 10,000 direct members in 28 countries—and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

NACDL has frequently appeared as *amicus curiae* before this Court, the federal courts of appeals, and the highest courts of numerous states. In furtherance of NACDL's mission to safeguard fundamental constitutional rights, the Association often appears as *amicus curiae* in cases involving

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[1] Pursuant to Rule 29(c)(5), counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

over-criminalization, over-federalization, and prosecutorial abuse.

NACDL appears as a friend of the Court to provide a broader perspective of the vast implications arising from the over-criminalization, and over-federalization, of offenses more appropriately resolved as civil penalties at the state level. With its long history championing the interests of criminal defendants wrongly convicted, NACDL respectfully suggests that its views may assist the Court in this matter.

SUMMARY OF THE ARGUMENT

Before this Court is the case of a commercial fisherman and three missing grouper.[2] At the heart of the issue presented is an unconstitutional expansion of federal law, resulting in Petitioner's wrongful conviction. Petitioner's conviction is but one more example of the overcriminalization epidemic.

Overcriminalization, and the overfederalization of traditionally state offenses, places a growing burden on the administration of justice—often resulting in ludicrous federal convictions for offenses better resolved with civil penalties and that, traditionally, fall outside constitutionally anticipated federal purview. In recent years, NACDL, and others, as *amicus curiae*,

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[2] Pursuant to Rule 37, counsel for *amicus curiae* states that counsel of record was notified of NACDL's intent to file an *amicus* brief under this Rule. The Solicitor General and Petitioner's counsel have consented to this filing.

have brought the phenomena of overcriminalization and overfederalization to the attention of the federal courts. Ordinarily, overcriminalization has been used to describe laws that are drafted with vague or overbroad language—which prevents fair notice to the alleged offender—and laws lacking a specific *mens rea* requirement; that is, the lack of a guilty mind. The overcriminalization attack is commonly asserted against Congress; i.e., those who draft the laws are to blame. But overcriminalization and overfederalization can also be shown through the *executive* expansion of criminal provisions in specific laws and regulations not intended (by Congress) to be so applied. For instance, improper prosecutorial discretion can result in the expansion of federal criminal law beyond legislative predictions where so-called "process crimes" are brought against defendants rather than charges directly relating to the underlying offense. The result is an overcrminalized society by virtue of unauthorized executive expansion of the law. This is squarely demonstrated in the instant appeal.

Indeed, NACDL has long been concerned that "expansive and ill-considered criminalization has cast the nation's criminal law enforcement adrift from [its] anchor." Brian Walsh and Tiffany Joslyn, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law*, The Heritage Found & NACDL, April 2010, at forward, VI. This sentiment was further presented to a by-partisan congressional judicial committee task force in 2013, specifically created to address the over-criminalization phenomenon. *See* Hearing Tr. Over-Criminalization Task Force of 2013, Serial No. 113-

44, at 21-22 (June 14, 2013). William Shepherd (counsel for NACDL herein) discussed the facts of this very case in response to a question from a Member of Congress, whose dismay was a prime example of how executive decisions leading to over-criminalization are an unwarranted expansion of Congress's intent. *Id.* Mr. Shepherd explained that though Mr. Yates was prosecuted under a criminal law drafted by Congress, "my guess would be that Congress had no idea that a post-Enron anti-document-shredding statute would be used to convict a man of destroying three red grouper." *Id.* at 22.

Thus, with overcriminalization and overfederalization as guideposts, NACDL urges this Court to accept jurisdiction and reverse the Petitioner's conviction for the legal insufficiencies suffered in the courts below. As a matter of law, the Petitioner could not have been adjudicated guilty under 18 U.S.C. § 1519 (2012) as the application of an anti-shredding statute to three rotten fish is an unconstitutional expansion of the law and a violation of statutory construction.

Additionally, the lower courts committed reversible error when they effectively shifted the burden of proof from the government to the Petitioner on the issue of whether the fish were undersized. This burden-shifting conduct essentially had the jury operating under the notion that, under the process crimes brought, the fish *are presumed* undersized, unless the defendant proves otherwise. This is contrary to our criminal law and particularly offensive in this case because the district court prevented the testimony of a would-be defense

expert, originally retained as a government expert, who testified the day before trial as the government's witness in a *Daubert* hearing.

ARGUMENT

I. PETITIONER'S CONVICTION UNDER 18 U.S.C. §§ 1519 AND 2232 THROUGH HIS CONDUCT ABOARD THE *MISS KATIE*, EXEMPLIFIES OVERCRIMINALIZATION STEMMING FROM AN UNCONSTITUTIONAL EXECUTIVE EXPANSION OF THE LAW.

An overly broad construction of 18 U.S.C. §§ 1519 (2012) and 2232 (2012) injures the integrity of the criminal justice system. Sections 1519 and 2232 are part of a class of "process crimes" that focus on offenses "not against a particular person or property, but against the machinery of justice itself." Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 Geo. L.J. 1435, 1437 (2009). In particular § 1519 provides:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any *record, document, or tangible object* with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under

> this title, imprisoned not more than 20 years, or both.

(emphasis added). Section 2232 provides:

> Whoever, before, during, or after any search for or seizure of property by any person authorized to make such search or seizure, knowingly destroys, damages, wastes, disposes of, transfers, or otherwise takes any action, or knowingly attempts to destroy, damage, waste, dispose of, transfer, or otherwise take any action, for the purpose of preventing or impairing the Government's lawful authority to take such property into its custody or control or to continue holding such property under its lawful custody and control, shall be fined under this title or imprisoned not more than 5 years, or both.

Allowing the federal criminal law to prosecute an individual only for conduct *relating* to an underlying offense, without thereafter proving the elements of the underlying offense, and through shifting the burden of proof, runs afoul of the criminal justice system if limitations are not in place. The overexpansion of Sections 1519 and 2232, exemplifies that risk.

A. THE OVERCRIMINALIZATION AND OVERFEDERALIZATION PHENOMENA.

Today, it is seemingly impossible to list all of the federal criminal statutes and regulations

currently in existence. Walsh & Joslyn, at 2-4, 6.[3] Indeed, the government cannot even tell its citizens how many crimes are on the federal books. *Id.* Nor can the Congressional Research Service (CRS) so inform the Chairman of the House Subcommittee on Crime, Terrorism, and Homeland Security, because as Congressman John Sensenbrenner stated at the June 14, 2013 Hearing referenced above, "CRS's initial response to our request [for a listing of all federal crimes] was that they lack the manpower and resources to accomplish this task. . . . I think this confirms the point that all of us have been making on this issue and demonstrates the breadth of overcriminalization."

Equally alarming is a 1998 American Bar Association Task Force estimation that at least another 10,000 regulations impose criminal sanctions and are so scattered as to render meaningful categorization impossible. *Id.* That study also found more than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970. *Id.* at 7. Extrapolated, this means that the amount of federal criminal provisions enacted in the twenty-six year period between 1970 and 1996 was almost equivalent to the amount of federal criminal provisions enacted in the

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[3] In the late 1980s, the Department of Justice suggested there were more than 3,000 federal criminal laws. *See* James A. Strazzella, *The Federalization of Criminal Law*, Criminal Justice Section, American Bar Association, 1998, at 94.

preceding 106 years. Alarmingly, this trend continues.[4]

In this case, the emergence of a new form of overcriminalization is exposed—wherein the executive branch overextends process crimes to prosecute individuals that cannot be found guilty under the statutes or regulations they were initially investigated under; i.e., over/undersized fishing. In these cases, burdens of proof are shifted through artful pleading and defendants are forced into untenable positions based on underlying conduct that the government claims is irrelevant to the process crime brought to convict. Thus, with Congress overcriminalizing through the enactment of laws which are later exacerbated through agency regulations, and the executive branch arresting and prosecuting individuals for acts not contemplated in

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[4] Ten years after the ABA Task Force report, Professor John S. Baker, Jr., while acknowledging many of the same difficulties as the ABA Task Force in trying to accurately count the total number of federal criminal laws, concluded that by the end of 2007 the United States Code contained at least 4,450 federal criminal laws. John S. Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, Heritage Foundation, Legal Memo. No. 26, June 16, 2008, at 5. Of those 4,450 federal criminal laws, approximately 452 (10%) had been added between 2000 and 2007, an average rate of 56.5 new criminal laws per year—*i.e.*, more than one per week. *Id.* at 1-2. Professor Baker commented that this rate is roughly the same rate at which Congress created new crimes in the 1980s and 1990s. So for the past twenty-five years, a period over which the growth of federal criminal law has come under increasing scrutiny, Congress has been creating over 500 new crimes per decade. *Id.*

already overly-broad process crimes, the criminal justice system is overburdened.[5]

B. EXECUTIVE EXPANSION OF 18 U.S.C. § 1519 TO INCLUDE RED GROUPER FURTHERS THE OVERCRIMINALIZATION EPIDEMIC.

If §1519 is read to encompass the destruction of fish, then the statute truly knows no bounds. It is up to the courts, as the gatekeepers, to ensure that congressional laws are not abused by the executive branch to criminalize conduct not contemplated under the applicable statute. Here, there are several fundamental concerns present in the government's approach to § 1519. First, § 1519 is a process crime. As discussed above, the government has been relying on this process crime, and similar process crimes, for retrieving convictions on individuals that would likely not be convicted under the underlying statute that was the cause of the investigation. Indeed, here,

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[5] Perhaps Justice Scalia has described the plight facing the Petitioner, and so many like him, most eloquently: "We face a Congress that puts forth an ever-increasing volume of laws in general, and of criminal laws in particular. It should be no surprise that as the volume increases, so do the number of imprecise laws. And no surprise that our indulgence of imprecisions that violate the Constitution encourages imprecisions that violate the Constitution. Fuzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation is attractive to the Congressman who wants credit for addressing a national problem but does not have the time (or perhaps the votes) to grapple with the nitty-gritty. In the field of criminal law, at least, it is time to call a halt." *Sykes v. United States*, 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting).

the Petitioner was not charged with violating any statutory provision specific to fishing. Second, there is clear language in the Congressional Record that § 1519 is an "anti shredding provision" and that "[t]he intent of the provision is simple; people should not be destroying, altering, or falsifying documents to obstruct any government function." 148 Cong. Rec. S7418-01, S7419 (2002). Third, this provision was passed after public pressure was placed on Congress to ensure that situations like Enron would not arise again in the future; it is no coincidence that the provision came into being less than a full year after Enron was exposed. And last, the government ignores the threat that such an over-expansion of the statute can have on everyday citizens living their everyday lives.

Section 1519 is inapplicable to the Petitioner because it provides criminal sanctions for persons that knowingly destroy or alter any "record, document, or tangible object" with the intent to impede a federal investigation—red grouper is not a document, record, or tangible object as envisioned in § 1519. *See* 18 U.S.C. § 1519 (2012). *Ejusdem generis*, one of the more powerful canons of statutory constructions recognized by this Court, provides where "general words follow specific words in a statutory enumeration, the general words are to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-115 (2001). Where "several items in a list share an attribute," *ejusdem generis* "counsels in favor of interpreting the other items as possessing that attribute as well." *Beecham v. United States*, 511

U.S. 368, 371 (1994). Moreover, under the maxim of *noscitur a sociis*, "a word is known by the company it keeps." *Edison v. Douberly*, 604 F.3d 1307, 1309 (11th Cir 2010) (internal quotation and citation omitted). Finally, the government would have this Court believe that a fish is like a record or a document, but it ignores Congress's own admission that § 1519 is an "anti-shredding" statute designed to prevent the conduct used in the Enron investigation and like cases. The aforesaid canons of construction, when paired with Congress's unambiguous intent to create a stronger anti-document-shredding provision, expose the government's assertion that fish are among the "tangible objects" contemplated under § 1519 as nothing more than an attempt to expand the statute's reach as an unconstitutional means to overcriminalize.

If § 1519 was drafted to include red grouper, then the overbreadth of the statute alone creates an unconstitutional overcriminalization, and vagueness, concern;[6] but if the statute was not drafted to

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[6] Academics and criminal defense lawyers have identified numerous concerns about Congress's rush to criminalize. Brian W. Walsh and Benjamin P. Keane, *Overcriminalization and the Constitution*, Heritage Foundation Legal Memo. No. 64, April 13, 2011, at 2-6; Walsh & Joslyn, at 3-5. Such concerns include the following: (1) vagueness/lack of fair notice wherein the concept of fair notice is rooted in the Constitution's due-process protections, "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964) (internal quotation marks omitted);[6] and (2) the lack of a *mens rea* requirement which has been a part of Anglo-American law since long before the founding of this country, and "requiring

include said fish, as the government argued below, then the prosecutorial action demonstrated through the statutes unfounded expansion itself creates the same unconstitutional issue. Thus, no matter which party is right, § 1519 unconstitutionally overcriminalizes. Finally, because the post-*Enron* enactment of Section 1519 suggests that red grouper were not among the tangible items contemplated by that anti-white collar crime effort (like disks and CDs), its expansion to grouper in this case is indicative of prosecutorial creep and unauthorized executive expansion of the law. Overcriminalization cannot be combated effectively if the executive branch expands criminal laws that are already overly broad. The courts must continue to perform their role to protect individual liberties and refuse to apply § 1519 to unspecified areas—in this case, grouper.

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the government to prove that a defendant had a guilty mind at the time she committed a guilty act 'is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.' " Walsh & Joslyn, at 3 (citation omitted). Despite the recognized importance of a *mens rea* requirement, the joint Heritage Foundation and NACDL study mentioned above concluded that over 50% of proposed criminal laws in the 109th Congress were silent as to the mental state of culpability required. Walsh & Joslyn, at 11-15.

C. NO REASONABLE JURY COULD HAVE CONVICTED THE PETITIONER UNDER § 2232 BECAUSE THE GOVERNMENT FAILED TO MEET ITS BURDEN OF PROOF.

The Due Process Clause of the Fifth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). The reasonable doubt standard protects the "fundamental value determination of our society, given voice in Justice Harlan's concurrence in *Winship*, that it is far worse to convict an innocent man than to let a guilty man go free." *Francis v. Franklin*, 471 U.S. 307, 313 (1985) (internal citation omitted). Therefore, to find that no reasonable doubt exists, the jury must rely on substantial evidence. *United States v. Taylor*, 144 F.3d 1423, 1426-27 (11th Cir. 1998) "If the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilty and a theory of innocence of the crime charged, then a reasonable jury must necessarily entertain a reasonable doubt." *Cosby v. Jones*, 682 F.2d 1373, 1383 (11th Cir. 1982).Though reasonable inferences can be made from the evidence, a guilty verdict cannot be supported by mere speculation. *United States v. Perez-Tosta*, 36 F.3d 1552, 1557 (11th Cir. 1994).

Petitioner's conviction was in error because the government failed to prove beyond a reasonable

doubt that the red grouper were undersized. It is undisputed that the government had the burden to prove the elements of the charged offense. To be adjudicated guilty under § 2232, the government must prove beyond a reasonable doubt the essential element that the government had "lawful authority" to seize the property in question at the time of the alleged offense. *See* 18 U.S.C. § 2232 (2012). It follows that to prove the government had "lawful authority" to seize the property, the property at issue must have been contraband. Thus, the government had the burden to prove that the grouper were undersized in order to convict the Petitioner under § 2232. Rather than present such substantial evidence, however, the government relied in its case-in-chief on the fact that the 69 red grouper ultimately seized and destroyed by the government were different from the 72 red grouper aboard the *Miss Katie* three days prior. The government claimed this amounted to "destruction" under § 2232 without regard to presenting substantial evidence that the "original" fish were indeed undersized.[7] In addition, there is no apparent distinction between 69 and 72 red groupers, in terms of culpability, under federal law. Thus, the destruction of three of these fish would have no impact on the government's ability to prosecute.

The burden shifting imposed on the Petitioner violated his due process rights and forced him into

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[7] Indeed, the only evidence so presented was that of Officer Jones's initial findings. It is undisputed, however, that Officer Jones failed to perform the measurement in accordance with federal law.

an untenable position—one in which he was required to present evidence disproving a theory that the government treated as a presumption. As a collateral consequence, the Petitioner's fishing business has been destroyed and he is sanctioned, either permanently or for a specified term, from 842 different federal and state privileges and rights by virtue of his felon status. *See* American Bar Association, *National Institute of Justice: Collateral Consequences*, available at http://www.abacollateralconsequences.org/CollateralConsequences /QueryConsequences (last visited Feb. 3, 2014). Not only does this shock the conscience, but it demonstrates the real threat that overcriminalization has on civil liberties and the common law understanding of criminal culpability—the presence of a guilty mind.

CONCLUSION

For the foregoing reasons, *amicus curiae*, NACDL, respectfully urges this Court to accept certiorari review of the aforesaid pending matter. This Court's voice is needed as a vehicle for controlling the ever-expanding criminal law.

Respectfully submitted,

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JOINT APPENDIX

RECORD AND BRIEFS

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In The

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JOHN L. YATES,

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UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

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TABLE OF CONTENTS

Page

United States District Court for the Middle District of Florida, No. 2:10-cr-00066-JES-SPC-1, Relevant Docket Entries 1

United States Court of Appeals for the Eleventh Circuit, No. 11-16093, Relevant Docket Entries..... 4

Indictment, *United States* v. *Yates*, No. 2:10-cr-00066-FtM-29-SPC (M.D. Fla. May 5, 2010) 6

Trial Transcript Volume II, *United States* v. *Yates*, No. 2:10-cr-00066-FtM-29-SPC (M.D. Fla. Aug. 3, 2011) (excerpts of testimony of John Wendell Jones)..... 10

Trial Transcript Volume II, *United States* v. *Yates*, No. 2:10-cr-00066-FtM-29-SPC (M.D. Fla. Aug. 3, 2011) (excerpts of testimony of James Kejonen)..... 60

Trial Transcript Volume II, *United States* v. *Yates*, No. 2:10-cr-00066-FtM-29-SPC (M.D. Fla. Aug. 3, 2011) (excerpts of testimony of Thomas Lemons)..... 67

Defendant's Exhibit E, *United States* v. *Yates*, No. 2:10-cr-00066-FtM-SPC (M.D. Fla. Aug. 3, 2011) (citation) 81

Government's Exhibit 1, *United States* v. *Yates*, No. 2:10-cr-00066-FtM-SPC (M.D. Fla. Aug. 3, 2011) (undersized catch measurement forms, Aug. 23, 2007)..... 82

TABLE OF CONTENTS—continued

Page

Government's Exhibit 2, *United States* v. *Yates*, No. 2:10-cr-00066-FtM-SPC (M.D. Fla. Aug. 3, 2011) (undersized catch measurement forms, Aug. 27, 2007)..... 85

Trial Transcript Volume III, *United States* v. *Yates*, No. 2:10-cr-00066-FtM-29-SPC (M.D. Fla. Aug. 4, 2011) (excerpts of argument by Mr. DerOvanesian) 89

Trial Transcript Volume III, *United States* v. *Yates*, No. 2:10-cr-00066-FtM-29-SPC (M.D. Fla. Aug. 4, 2011) (excerpts of testimony of Karen Lee Jane Bell)..... 95

Trial Transcript Volume III, *United States* v. *Yates*, No. 2:10-cr-00066-FtM-29-SPC (M.D. Fla. Aug. 4, 2011) (excerpts of testimony of Sandra Lynn Yates)..... 95

Court's Instructions to the Jury, *United States* v. *Yates*, No. 2:10-cr-00066-FtM-29-SPC (M.D. Fla. Aug. 5, 2011) 103

Opinion and Order, *United States* v. *Yates*, No. 2:10-cr-00066-FtM-29-SPC (M.D. Fla. Aug. 8, 2011)..... 115

Judgment, *United States* v. *Yates*, No. 2:10-cr-00066-FtM-29-SPC (M.D. Fla. Dec. 9, 2011) 118

Opinion, *United States* v. *Yates*, No. 11-16093 (11th Cir. Aug. 16, 2013) 124

U.S. DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
(Ft. Myers)

Criminal Docket for Case #: 2:10-cr-00066-JES-SPC-1

USA

v.

YATES

RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
		* * *
05/05/2010	3	INDICTMENT returned in open Court as to John L. Yates (1) count(s) 1, 2, 3. (RMT) (Entered: 05/13/2010)
		* * *
08/05/2011	105	COURT'S FINAL JURY INSTRUCTIONS as to John L. Yates (BMA). Modified on 10/28/2011 to correct attachment. (RKR). (Entered: 08/05/2011)
		* * *
08/08/2011	109	ORDER as to John L. Yates denying Rule 29 motion for judgment of acquittal as to Count Two. Signed by Judge John E. Steele on 8/8/2011. (RKR) (Entered: 08/08/2011)
		* * *

DATE	NO.	PROCEEDINGS
12/09/2011	119	JUDGMENT as to John L. Yates (1), Counts 1, 2, Imprisonment: 30 days, as to each count to be served concurrently; Supervised Release: 36 Months as to each count to run concurrently; Special Assessment: $200.00.; Count 3, Not guilty by jury verdict. Signed by Judge John E. Steele on 12/9/2011. (BMA) (Entered: 12/09/2011)
		* * *
05/31/2012	141	TRANSCRIPT of Jury Trial as to John L. Yates held on 08/03/11 before Judge John E. Steele. Court Reporter/Transcriber Jeffrey G. Thomas, Telephone number (239) 461-2033. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or purchased through the Court Reporter. Redaction Request due 6/21/2012, Redacted Transcript Deadline set for 7/2/2012, Release of Transcript Restriction set for 8/29/2012. (JGT) (Entered: 05/31/2012)

DATE	NO.	PROCEEDINGS
05/31/2012	142	TRANSCRIPT of Jury Trial as to John L. Yates held on 08/04/11 before Judge John E. Steele. Court Reporter/Transcriber Jeffrey G. Thomas, Telephone number (239) 461-2033. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER or purchased through the Court Reporter. Redaction Request due 6/21/2012, Redacted Transcript Deadline set for 7/2/2012, Release of Transcript Restriction set for 8/29/2012. (JGT) (Entered: 05/31/2012)
		* * *
08/16/2013	149	USCA Opinion affirming the decision of the District Court as to John L. Yates re 121 Notice of Appeal USCA number: 11-16093-AA. Mandate to issue at a later date. (slp) (Entered: 08/20/2013)
		* * *

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Court of Appeals Docket #: 11-16093

USA

v.

JOHN YATES

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
	* * *
09/24/2012	Appellant's brief filed by John L. Yates. Service date: 09/24/2012 [11-16093] Attorney for Appellee. McNamara – hand delivery. (ECF: John Badalamenti)
	* * *
11/13/2012	Appellee's Brief filed by Appellee USA. Service date: 11/13/2012 email – Attorney for Appellant: Badalamenti; Attorney for Appellee: McNamara. (ECF: Linda McNamara)
	* * *
12/04/2012	Reply Brief filed by Appellant John L. Yates. Service date: 12/04/2012 email – Attorney for Appellee: McNamara. (ECF: John Badalamenti)
	* * *

DATE	PROCEEDINGS
08/16/2013	Opinion issued by court as to Appellant John L. Yates. Decision: Affirmed. Opinion type: Published. Opinion method: Signed. (Corrected opinion uploaded to the court's website) – [Edited 11/07/2013 by DC]
08/16/2013	Judgment entered as to Appellant John L. Yates.
09/25/2013	Mandate issued as to Appellant John L. Yates.
	* * *
04/28/2014	Writ of Certiorari filed as to Appellant John L. Yates is GRANTED. SC# 13-7451.
	* * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

[Filed May 5, 2010]

Case No. 2:10-cr-66-FtM-29-SPC

18 U.S.C. § 2232(a), § 1519 § 1001(a)(2), § 2

UNITED STATES OF AMERICA

v.

JOHN L. YATES

INDICTMENT

The Grand Jury charges that:

COUNT ONE

On or about August 24, 2007, within the exclusive economic zone of the United States in the Gulf of Mexico, and elsewhere out of the jurisdiction of any particular State or district,

JOHN L. YATES,

defendant herein, being a resident of the Middle District of Florida, before the search for and seizure of property, to wit, undersized fish, by a person authorized to make such search and seizure, namely, personnel of the United States Coast Guard and the National Marine Fisheries Service, did knowingly dispose of and throw overboard and attempt to dispose of and throw overboard undersized fish, for the

purpose of preventing and impairing the Government's lawful authority to take such property into its custody and control.

In violation of Title 18 United States Code, Section 2232(a) and Section 2.

COUNT TWO

On or about August 24, 2007, within the exclusive economic zone of the United States in the Gulf of Mexico, and elsewhere out of the jurisdiction of any particular State or district,

JOHN L. YATES,

defendant herein, being a resident of the Middle District of Florida, did knowingly destroy, conceal, and cover up undersized fish with the intent to impede, obstruct, and influence the investigation and proper administration of the catching of red grouper under the legal minimum size limit, a matter within the jurisdiction of the National Marine Fisheries Service, an agency of the United States.

In violation of Title 18, United States Code, Section 1519 and Section 2.

COUNT THREE

On or about August 26, 2007, at Cortez, in Manatee County, in the Middle District of Florida,

JOHN L. YATES,

defendant herein, in a matter within the jurisdiction of the executive branch of the Government of the United States, did knowingly and willfully make a materially false, fictitious, and fraudulent statement and representation, that is, that all of the undersized fish measured by the Florida Fish and Wildlife Conservation Committed on August 23, 2007, were

aboard the F/V *Miss Katie*, when in truth and in fact as the defendant well knew, he had caused a crewmember to throw overboard the undersized fish.

In violation of Title 18, United States Code, Section 1001(a)(2) and Section 2.

A TRUE BILL.

/s/ [Illegible]
FOREPERSON

Date: 5/5/10

A. BRIAN ALBRITTON
United States Attorney

BY: /s/ Jeffrey F. Michelland
JEFFREY F. MICHELLAND
Assistant United States Attorney
Trial Counsel

BY: /s/ Douglas Molloy
DOUGLAS MOLLOY
Assistant United States Attorney
Chief, Fort Myers Division

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

[Filed May 5, 2010]

Case No. 2:10-cr-00066-JES-SPC

UNITED STATES OF AMERICA

vs.

JOHN L. YATES

INDICTMENT

Violations:

18 U.S.C. § 2232(a)
18 U.S.C. § 1519
18 U.S.C. § 1001(a)(2)
18 U.S.C. § 2

A true bill,

/s/ [Illegible]
Foreperson

Filed in open court this 5th day of May, A.D. 2010.

Clerk

Bail $_____

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

Case No.: 2:10-CR-66-FtM-29SPC

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN L. YATES,

Defendant.

VOLUME TWO OF FOUR

Fort Myers, Florida

August 3, 2011

9:00 a.m.

TRANSCRIPT OF JURY TRIAL, DAY TWO

HELD BEFORE THE HONORABLE
JOHN E. STEELE
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES

FOR PLAINTIFF: Office of the United States Attorney
2110 First Street
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(239) 461-2200

BY: Jeffrey Michelland, Esq.
Assistant United States Attorney

FOR DEFENDANT: Federal Public Defender's Office
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BY: Martin Derovanesian, Esq.

REPORTED BY: Jeffrey G. Thomas, RPR-CP
Official Federal Court Reporter
United States Courthouse
2110 First Street, Suite 2-194
Fort Myers, FL 33901
(239) 461-2033

* * * *

[48] JOHN WENDELL JONES,

called as a witness by the Government, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MICHELLAND:

Q Good morning, sir.

A Good morning, sir.

Q Please state your employment.

A I am currently a field supervisor with the Florida [49] Fish and Wildlife Conservation Commission here in Crystal River, Florida.

* * * *

Q What is the Florida Fish and Wildlife Conservation Commission?

A It is a commission that we regulate the fish and wildlife in the State of Florida with regard to bag limits, size limits, seasonal limits on hunting, hunting regulations, fishing regulations, both fresh and saltwater.

Q And abbreviation for that would be FWC?

A Yes, sir, it is.

Q And what is your title with the FWC, sir?

A Currently, I'm a field supervisor.

Q How long have you been a field supervisor?

A Approximately three years.

* * * *

[53] Q I understand what your title was, but what were your duties and responsibilities?

A At the time, I was a—what we considered a 50 percent water patrol position, which was 50 percent of my time mandated to be spent on marine enforcement.

Q Out on the boat.

A Yes, sir.

Q And, currently, your duties and responsibilities, I would assume, would be to supervise others who are doing that?

A Not at the time.

Q No. Currently, sir.

A Currently, yes, sir.

Q Now, the FWC is a state agency; correct?

A That is correct.

Q Back in 2007, as an FWC officer, were you also deputized as a federal officer?

A Yes, sir.

Q Explain with whom were you deputized, and what the purpose was.

A When I attended the marine patrol academy in 1993, part of our training was we were cross-deputized for National Marine Fisheries Service, U.S. Customs, and the Department of the Interior, which was U.S. Fish and Wildlife.

[54] Q I need to ask you if you can explain what that means. What does cross deputization mean?

A Cross deputization allows us to go into federal waters, which in our area is nine miles offshore, to enforce the federal fisheries laws.

Q And in your duties of enforcing the federal fisheries laws, does that also mean you were called upon—or you would monitor catch size?

A That is correct.

Q Can you just give us a general explanation as to the rules restriction pertaining to the legal limit of fish?

MR. DEROVESIAN: Your Honor? I'm going to—may we approach on that?

The Court: You may.

AT SIDEBAR

MR. DEROVANESIAN: Your Honor, again, I apologize to the Court. I think I misunderstood you at the prior sidebar. Are you going to permit us to argue that—will I be permitted to argue, on cross, that their requirement that the mouth be closed is not consistent with federal law, that the law says it can be open or closed? May I use that on cross-examination of this officer?

THE COURT: Any objection?

MS. CALDARONE: Yes, Your Honor. We would be

* * * *

[58] Q Now, is red grouper a fish that has been commonly encountered by you during the course of your duties with FWC?

A Yes, sir, they are.

Q Is it a fish that's also commonly encountered by commercial fishermen?

A Yes, sir.

Q What is your level of familiarity with red grouper in terms of the laws pertaining to its harvest, measurement, and storage?

A Currently, the size limit for the red grouper commercially is 18 inches total overall length.

Q What was it back in 2007, if you know?

A They were 20 inches.

Q Now, are all . . . . What was your understanding, back in 2007, as to the way red grouper could be measured to determine their overall length?

A Mouth closed, tail pinched.

Q And could they be measured with the mouth open?

A Yes, they could.

Q Now, were they to be measured on what's called a measuring board?

A That is correct.

* * * *

[59] A Yes, it would be.

Q So you could go into a little bit more detail on how you were trained properly to—properly to measure red grouper like—go through the motions of what you would do.

A Basically, when I conduct a boarding, whether it's a commercial boat or a recreational boater, and I observe fish in their coolers, they're often cold, so sometimes they're not in a . . . a relaxed state.

I mean, when you put something on ice, they become cold, and a little rigid. So if you remove a fish out of the fish box, and it's obviously been laid in the cooler in a manner that it's no longer straight, I'll take it and twist it over a straight edge to get it where it's more pliable. But if you would take a fish that's been laying on top of another fish like this, and you lay it on a board, then it's obviously going to be not the correct length. So, basically, if you loosen it up and lay it on the board, it's now more pliable, where you can measure properly.

And the way I do it is close the mouth, but ease the fish up to the end, at the starting point, and pinch the tail, and that gives you your total overall length.

Q You mentioned that you ease the fish up to the end. Is there a . . . is a measurement board in inches or centimeters, first of all?

A Inches.

[60] Q And extends for approximately three feet or maybe?

A Yes, sir. Most our measuring boards will see a 36-inch.

Q And is there something on the one end which would prevent—which would be where the starting point of the measurement would be?

A On the boards that we use, there is.

Q And what is that?

A It's a—what we're now using—

Q What did you use in 2007?

A A piece of aluminum that's bent on a 90-degree angle.

Q So it stands perpendicular to the measuring board?

A That is correct.

Q And when you mentioned, in your testimony, that you ease the fish up, were you referring to easing it up to that aluminum perpendicular . . . platform?

A Yes, sir. The starting point.

Q Starting point. Now, have you ever heard of the term scrunching?

A Excuse me?

Q Scrunching. Have you ever heard of that term?

A I don't believe I have.

Q Were you ever trained to forcibly press the fish up against the aluminum starting point?

A No, sir.

[61] Q when you say ease, what do you mean by that?

A Well, it would not be proper to take a fish and jam them into the starting point with such force that you're now—if you were going to hit that end, and then the nose would turn up, that's not an accurate measurement. So you take the fish and you slide it to where it touches, barely touches the starting point, and that would give you a correct starting.

Q When you measure, when you've been trained the proper way to measure, would you apply pressure against—of the fish against the starting point, such that it might lessen the measurement of the fish?

A No, sir.

Q Now, when measuring fish, and in particular red grouper, were you trained to account for whether the catch was frozen, as opposed to just harvested?

A No, sir.

Q But you would want to ensure that the fish was lying flat on the measuring board.

A That is correct.

Q Were you trained to account for any other variables, such as how this fish was stored?

A No, sir.

Q About how long they had been on ice?

A No, sir.

[62] Q Whether they were within federal or state waters?

A No, sir.

Q Short fish is a short fish.

A That is correct.

MR. DEROVANESIAN: Objection, Your Honor. Improper statement of the law.

THE COURT: Overruled.

Q Now, the method that you described to the members of the jury on how you measure fish, did you use that method regardless of whether you're within state waters or federal waters?

A Yes, sir.

Q And is this the method that you use, and used, in all cases involving red grouper?

A Yes, sir.

Q Now, with respect to measuring a red grouper with the mouth open, have you ever used that particular method to measure red grouper?

A No, sir.

Q And what are the concerns with measuring the red grouper with the mouth open in your experience, sir?

MR. DEROVANESIAN: Objection, leading.

THE COURT: Overruled.

A If I were to put myself in the position of the fisher, be it commercial or recreational, and me being

a [63] fisher myself, it would be virtually impossible to have consistent measurement throughout the law enforcement community, and even the recreational and commercial community, where everybody would hold that mouth in the exact open state every time.

Mouth open, how far would you open the mouth? A quarter inch? Halfway? Or would you a draw the mouth so far open that—so it would be—it would be up to the discretion of who happened to be measuring the fish at the time. So I find that that would be an inaccurate way to measure a fish. If you close the mouth, everybody's at the same starting point. Ease the fish to the starting point, flatten the tail out, and you're good.

Q Is the method that you described commonly accepted in the fishing industry? As far as you know.

A As far as I know, yes, sir.

Q And is it proper according to any particular organization?

A Yes, sir.

Q What's that?

A Our agency recognizes that the mouth's closed, the tail pinched.

Q Are you aware of other commercial fishermen fishing nor red grouper that use the method you just described?

A Yes, I do.

* * * *

[68] Q Yourself?

A Myself, Lieutenant Mazzeo, and Officer Doug Loyed.

Q And Officer Doug Loyed is also an officer with the FWC.

A That is correct, sir.

Q Who was the captain of the body?

A Lieutenant Ken Mazzeo.

Q Is he the one that piloted the boat?

A Yes, sir, he did.

Q Is it normal when you would go out on patrol that you would go with yourself and two other people?

A Yes, sir, it was.

Q Now, as far as your authorization as a deputized federal officer in federal waters, did you have authority to inspect—and, by the way, you were deputized at an officer with National Marine Fisheries Service?

A Yes, sir.

Q And that's the capacity you were acting in at the time?

A Yes, sir.

Q Did you have the authority to inspect a catch on boats operated by commercial fisherman?

A Yes, sir, I did.

Q Do you have authority to do that, or did you have authority to do that, even without a search warrant, sir?

[69] A That is correct.

Q Where did the Guardian go after it departed?

A I'm not particularly sure, but I know we—we head on a heading of about 240 out of Crystal River—240 degrees out of Crystal River.

Q Would that be fairly close to a westerly direction?

A Yeah. South by southwest direction is, I believe, the way we went when we left the dock.

Q Did you encounter a boat called the Miss Katie at some point during your voyage?

A Yes, we did.

Q Was it on the 23rd of August?

A Yes, it was.

Q And can you tell us approximately what time you encountered the Miss Katie?

A I do not recall.

Q Is there a report that might refresh your recollection, sir?

A Yes, it would.

MR. MICHELLAND: May I approach the witness, Your Honor?

THE COURT: You may.

BY MR. MICHELLAND:

Q Sir, please take a look at the report. I don't want you to testify from it, but if it helps you refresh your [70] recollection, then you can put it down and testify.

A Certainly.

Q Does it help you to do that, sir?

A Yes, it did.

Q All right. Can you tell us approximately what time you encountered the Miss Katie?

A Approximately 4:20 in the afternoon.

Q So it was not around noon.

A No, sir, it was not.

Q How fast does the Guardian go?

A I do not know.

Q Did it go faster than the Miss Katie?

A I cannot state.

Q Was there—when you say you and the other members of your boat encountered the Miss Katie, can you tell us—kind of run us through. You saw the boat from a distance, and . . . .

A Sure.

Q And why, if for any reason, did you decide to investigate the boat?

A Okay. As I testified to earlier, we were on routine offshore patrol, whether to board commercial vessels or recreational vessels, at the Florida middle grounds. We had entered into the area and had conducted some fisheries inspections on both comercial and recreational boaters in [71] the area, and had proceeded, I believe, north.

At that time we picked up our radar on the target. Lieutenant Mazzeo, who was the boat captain, proceeded to the target to see what the vessel was doing. As we got closer, we could tell that the vessel was a commercial vessel actually engaged in commercial harvest. Using longline gear.

Q What are the Florida middle grounds?

A Florida middle grounds is an area that has specific rules regarding the gear that you can use, the seasons. It's approximately a hundred miles offshore due west of Tampa.

Q And did the Guardian then approach the boat that was later determined to be the Miss Katie?

A Yes, sir, we did.

Q And how did the Guardian approach that boat?

A A standard boarding 45-degree angle, come alongside.

Q And does it tie up to the—did it tie up to the Miss Katie?

A At that time, he did not. He came alongside, myself and Officer Loyed stepped off the patrol vessel onto the Miss Katie.

Q And what was your purpose for doing that, sir?

A To check the gear compliance and fishery inspections, and boating safety inspection.

[72] Q Was there anything that caught your attention with respect to bait compliance?

A Yes, sir, there was.

Q What was that?

A As I was boarding the vessel, I scanned around the vessel, typically is what we do, making sure there's no weapons or anything about that we need to be aware of. As we were scanning the vessel, I noticed there were three grouper hanging nearby.

Q And did that concern you in terms of the legality of—

MR. DEROVANESIAN: Objection, leading.

Q Did that give you concern, sir?

A Yes, sir, it did.

Q And why is that?

A Based on my training and experience, I could tell that the fish that were hanging on the hook—there were several problems. The fish appeared to be undersize, the fish were not in a properly cooled cooler with finely divided ice on them, and they were just hanging out there in the open.

Q Where, approximately, was this vessel, the Miss Katie, located at that time of the boarding, sir?

A You mean the longitude/latitude position?

Q No, but was it in state or federal waters?

[73] A It was in federal waters.

Q And was it within the exclusive economic zone of the United States?

A Yes, it was.

Q What is that?

A That's those waters that are west of the nine-mile line off the State of Florida. From land—from the land out to nine miles is state water; and, once you go out west of the nine-mile line, you are in the EZ Zone, the Economic Exclusive Zone.

Q Did you have authority to investigate matters within those waters?

A Yes, sir, we do.

Q And, at that time, your were acting as a federal officer.

A That is correct.

Q Who was present when you and Officer Loyed boarded the Miss Katie?

A Who was present on the Miss Katie?

Q Correct.

A There was a captain and two mates.

Q Do you see anyone in the courtroom—do you see the captain in the courtroom today?

A Yes, sir, I do.

Q Would you please describe where he's sitting and what

* * * *

[75] his fish box?

A Yes, I did.

Q And what was his response?

A He said he did.

Q And after you told him what you were planning to do, did he have a response to that, sir?

A I do not recall.

Q Now, what did you then do next?

A I continued my inspection of the fish box.

Q Can you describe to us where the fish box was located on the Miss Katie?

A The fish box was toward the rear of the boat, center of the rear.

Q Did it have a number of different compartments in it?

A Yes, it did.

Q And did you open all the compartments?

A Yes, I did.

Q What did you see in some of the compartments, or . . . what else did you see, other than fish, if you saw fish?

A There was bait. There was food. Drink. And what they call—or at we call replenishing ice, which they take ice out there with them.

Q So the compartments for all of—there were separate compartments for all of those items?

[76] A Yes, sir.

Q And the fish were also in a separate compartment?

A Yes, sir.

Q Were the fish on ice, sir?

A They were.

Q Did anyone—what was your purpose for going in there to check on those fish?

A To make sure they were the right size.

Q Did you then go ahead and measure the fish to make sure they were the right size?

A Yes, sir, I did.

Q Did you measure all of the fish, sir?

A Only the fish that I visually observed to be of need of measurement. Some of the fish were obviously well oversize, they were a good size, so there's no need to measure a fish that's obviously over the 20.

Q And that's based on your vast experience with FWC, and looking at fish, and determining the approximate size just by eyeballing them?

A That is correct.

Q But did you want to become—did you want to be more specific with respect to that, sir? On that day. In terms of measuring the fish.

A Like I said, the fish that I pulled out, a visual inspection of them, if it's a 30-inch fish, or a 25-inch [77] fish, I don't take the time to measure that fish. That fish is placed in a separate section, and we go to the next fish.

Q And the ones that you thought might be 20 inches or below, what did you do with them?

A We separated them as we went along. Or I separated them as I went along.

Q Would you please tell us how you separated them?

A They are placed on wooden crates that are typically found on the boats, we'll take them and set them aside, and see how many—you know, see how many fish that we find that are undersize and . . . until we get down to the bottom. And in this case, right off the bat, early in the inspection, I started finding short fish right off the bat.

Q Well, when you placed them in the wooden crates, did you measure them first, or put them all in the wooden crates first?

A They were measured first, and then placed in the crates.

Q The fish that you initially could see were of legal size, where did those fish go?

A They remained in the fish box.

Q With the ice.

A That is correct.

Q And so were they put to one side, so they would be separated from the fish you had not checked already?

[78] A Yes, sir.

Q In the ice?

A That is correct.

Q The ones that you continued to check, first of all, all these fish were on ice?

A Yes.

Q Were all these fish cold?

A That is correct.

Q Were they frozen though?

A No, they were not.

Q And why is that?

A This particular boat does not have a means to freeze fish.

Q They would have to be put in a freezer type—

A That is correct.

Q —appliance or whatever?

A Correct.

Q So even if they're submerged and covered in ice, they are not going to freeze all the way through?

A No, sir.

Q So the ones that you believed to be undersized, how did you go about measuring those fish?

A Typically, the way I do a boarding—

Q Not typically. I just want to know in this case.

A In this case, the fish were measured. The ones that [79] were found to be short were placed to the side, in wooden crates, to be remeasured a second time.

Q Was there any ice in those wooden crates?

A No, sir.

Q How long did it take you to measure all of the fish, approximately?

A Probably about 35 minutes.

Q What was the procedure you used to, in fact, measure the fish, which—let me ask you this: Did you use a measuring board?

A Yes, sir, I did.

Q Was that a board that you used from the Guardian, or was that something from the Miss Katie?

A I used both boards. I used both. First time, I used their measuring board.

Q You used the Miss Katie's measuring board?

A The Miss Katie's measuring board.

Q How did you know where to find that?

A I don't recall if they offered it. I asked them what they measured the fish with, and they produced what they used.

Q Was there anything on that measuring board that drew your attention, sir?

A Yes, sir, there was.

Q Can you tell the jurors what that was?

[80] A There was a mark on the measuring board at 19 and a half inches.

Q Was there also a mark at 20 inches?

A Yes, sir.

Q Are there any fish, that you're aware of, that had a minimum legal size of 19 and a half inches?

A No, sir.

Q And how would you go about actually using their measuring board—how did you in this case—to measure the fish?

A The mouth was closed, the tip of the snout was touched to the board, and the tail was pinched, to determine a total overall length of the fish.

Q Did you smash the mouth up against the perpendicular board?

A No, sir, I did not.

Q What did you do with the mouth?

A The mouth? The mouth was closed, the fish was placed forward until it touches the board.

Q Was the defendant—did you actually do the measuring, sir?

A Yes, sir, I did.

Q Did Officer Loyed or Officer Mazzeo do the measuring?

A No, sir, they did not.

Q Was Officer Loyed present to witness your measuring?

[81] A Yes, he was.

Q What did he do?

A Officer Loyed acted as my scribe. I would call out the measurements, and he would write them down.

Q What were your findings with respect to the fish that you measured?

A Of the fish that were harvested, I found 72 undersize red grouper.

Q Were the defendant or his crew members present during the time that you were -- well, they were present, but did they witness, if you know, the measuring process, sir?

A I believe the captain did; yes, sir.

Q And, at that time, what was the legal minimum size limit for red grouper?

A 20 inches.

MR. DEROVANESIAN: Objection, asked and answered.

THE COURT: Overruled.

A 20 inches.

Q Were there any red grouper that were borderline, or close to the 20-inch requirement, but somewhat a little bit less than that?

A Yes, sir, there were.

MR. DEROVANESIAN: Objection to the characterization borderline.

THE COURT: Overruled.

[82] A Yes, sir, there were.

Q And what do you understand me to say when I—

A To put it in lay terms, we're not splitting hairs. We take in the totality of the product that is harvested, and we take into account that there are going to be some fish that these guys are going to—they're going to be so close on 20 inches—it's hard to explain, but if a fish is within an eighth of an inch, we're typically going to give them the benefit of the error.

Q And not include that as an undersize fish?

A That is correct.

Q Did you do that in this case, sir?

A Where that takes place is typically, on the second measurement, we go back, and that's when we really look at it and take into account and make the decision on whether it's—you know.

Q Well, we'll jump ahead, and I'll just ask you, did you do a second measurement on these fish?

A Yes, sir, I did.

Q Did you give the benefit of the doubt on the borderline fish on the second measurement?

A Yes, I did.

Q All right. Let's talk about how you measured the fish the second time.

A Basically the same way. Close the mouth, the fish is [83] placed on the board, and we look at the overall total length again, and make the call.

Q The fish had—what you believed to be undersize fish, including the borderline fish, were placed in the boxes; correct?

A The wooden crates; yes, sir.

Q And then what did you do from there?

A The fish were individually removed from there, remeasured again. The ones that we were considering to be so borderline that it was splitting hairs, so to say, they were put back in the harvestable catch.

Q Did you use the same measuring board the second time around?

A We got the measuring board off the Patrol Vessel Guardian to do the final measurement.

Q Did you compare that measuring board with the one that was being used by Mr. Yates?

A Yes, sir, we did.

Q And were there any discrepancies in terms of the measurement from zero to 20 inches that you could see?

A No, sir. We found them consistent.

Q And then how long did it take you to do the second measuring, or I guess the whole process of measuring, including the first and second measurements?

A Well, it took probably 35 minutes to narrow it down [84] to a group of fish, and probably about 15 to 20 minutes to remeasure.

Q The second time around, when you used the measuring board from the Guardian, were those measurements recorded?

A Yes, sir, they were.

Q The first time, the first measurement, were those measurements recorded?

A I do not recall.

Q Is it normal procedure for you to have recorded the first measurements if were you going to—

A No, sir, it's not.

Q Do you recall whether or not you called out the measurements from the first measurement to Officer Loyed?

A Typically, I call out the numbers on the second measurements, because the first measurements are just for my knowledge, which ones I need to pull to the side to better check a little closer.

Q And were the measurements recorded at the time of you calling them out to Officer Loyed?

A Yes, sir, they were.

Q How did you record the measurements, sir? Or how were they recorded?

A I believe Officer Loyed used the catch measurement verification form.

Q Did you ultimately sign that form?

[85] A I believe I did, sir.

MR. MICHELLAND: May I approach the witness, Your Honor?

THE COURT: You may.

MR. MICHELLAND: May I freely approach the witness, Your Honor?

THE COURT: You may.

BY MR. MICHELLAND:

Q I show you what's been marked for identification as Government's Exhibit Number 1, and I ask if you can identify it.

A It's a catch measurement form that bears my signature.

Q And the date?

A August 23rd, 2007.

Q And the—

A 16:50 hours.

Q All right. So, actually, the 16:50 . . . .

A Yeah. It looks like—I have to apologize, it looks like 16:50.

Q Pardon me?

A It's . . . . Yeah, 16:50 hours.

Q And you arrived at approximately 16:20?

A Yes, sir.

Q I would offer—is this document a fair and accurate [86] representation of the catch measurement form and the measurements of the fish that you measured on August 23rd of 2007?

A Yes, sir, it is.

MR. MICHELLAND: I would offer into evidence Exhibit Number 1 at this time.

THE COURT: Any objection?

MR. DEROVANESIAN: Your Honor, can I voir dire the witness on this?

THE COURT: You may.

VOIR DIRE EXAMINATION

BY MR. DEROVANESIAN:

Q Now, Officer Jones, on Government's Exhibit 1, you indicated that you were the one that was making the measurements; is that correct?

A I was measuring the fish; yes, sir.

Q And you were calling out the numbers to Officer Loyed?

A Doug Loyed; yes, sir.

Q Were you able to see what Officer Loyed was writing down, and what numbers he was putting on the form?

A No, sir, I was not.

Q Where were you when you were calling out the numbers?

A In the fish box.

Q You were in the fish box.

* * * *

[90] Q Officer Jones, if you can see the exhibit on your screen, or on the big screen, the column on the left is . . . . is a number for the column that says, "Fish." Did you number each particular fish?

A I did not.

Q But they were numbered?

A That is correct.

Q And then the measurement would be shown in the column to the right; is that right?

A That is correct.

Q And did you sign it at the bottom?

A Yes, sir, I did.

Q And this would be the first page, the second page, and the third page; is that correct?

A That is correct.

Q Now, why does the third page look different than the—there's actually one that says 18 and seven eighths; [91] is that correct?

A Yes, I believe that's what it says.

Q Another one that says 18 and three quarter?

A Right.

Q They're all, another one on the front page that said 18 and seven eighths; is that right?

A Yes, sir.

Q And they're all below 20 inches; is that correct?

A That is correct.

Q Why is the last page different from the first two?

A I'm not sure.

Q Did you . . . the number of undersize fish that you found on the Miss Katie on that particular day, the red grouper, was that an inordinate—I can't even say the word.

MR. DEROVANESIAN: Objection, relevance.

THE COURT: Let him try and finish the question first.

Don't answer it yet.

MR. MICHELLAND: An inordinate number of undersize fish to find on a commercial fishing vessel.

THE WITNESS: Yes.

MR. DEROVANESIAN: Objection again, relevance and basis.

THE COURT: Overruled.

[92] THE WITNESS: Yes, it is.

BY MR. MICHELLAND:

Q What would you normally expect to find, sir?

A On a load that size? One or two.

Q Did you review this catch measurement form with the defendant after it was filled out?

A Yes, I did.

Q Did the defendant have any reaction to your findings, sir?

A Yes, he did.

Q What were his reactions, or what was his reaction?

A He was upset with the size on some of the fish that were found on his boat.

* * * *

[94] Q Does that really say he measured it?

A Yes, sir.

Q Did he measure that one?

A Yes, sir, he did.

Q Tell us about that.

A While I was attempting to measure the fish, Mr. Yates was obviously kind of watching, and he could realize that some of the fish were short. He was very upset with his crew throughout the boarding. And after I—and I told him, when I got done, I would

measure the fish all again, just to double-check. And when finished up, he measured one of them, and that's when he seemed very surprised about the size of the fish. And that's when he made the statement to the mate.

Q "Look at this fish. It's only 19 inches. How could you miss that one?"

A Yes, sir.

Q Did he measure any other fish, or remove any other fish? Do the same thing?

A I don't remember.

Q Any other reaction to the Exhibit Number 1, the catch measurement form, by the defendant, that you remember?

A I don't remember.

Q Any other reaction to Exhibit Number 1, the catch measurement form, by the defendant, that you remember?

A I do not recall.

Q Did you ask the defendant whether he'd be willing to agree, or sign the document?

[95] A Yes, I did.

Q What did you ask him?

A He declined to sign it at that time.

Q And was there—there's a column that says agree or disagree?

A That is correct.

Q There are two columns actually. Was he willing to say whether he agreed or disagreed?

A He just did not sign it. He did not acknowledge whether he agreed or disagreed. He agreed with the 19-inch grouper that he measured.

Q Now, there's a . . . a U up here, for undersized?

A Yes, sir.

Q Was that filled in anywhere on the document?

A No, it was not.

Q Why was it not?

A I'm not sure why Officer Loyed did not mark that.

Q Were these fish undersize, sir?

A Yes, sir, they were.

Q Is it always illegal for a commercial or other fisherman to keep an undersize fish, sir?

A Could you say the question again, sir?

Q Is it always illegal for a fisherman to keep an undersize fish, one that they have caught?

A Yes, it is.

[96] Q Does it matter how much a fish is undersize?

A No, it does not.

Q Are required to take any other factors into consideration when making that determination, such as the fisherman's knowledge, whether it's an honest mistake, or anything like that, sir?

A No, sir.

Q Must the method used by the fisherman to measure the fish be considered in your determination as to whether the fish are undersized?

A No.

Q So, no matter what, an undersize fish is always an illegal catch.

A That is correct.

Q On August 23rd, during this boarding, was your method, or the way you measured the catch, ever questioned by Mr. Yates?

A No, sir.

Q By any of the crew members?

A No, sir.

Q Did you issue the defendant a citation for the undersize fish at that time?

A Yes, sir, we did.

Q What did you have done—or what was done with the undersize fish after they were documented on the catch [97] measurement form, sir?

A As I stated, testified to earlier, as the undersize fish were double-checked, the one that were undersize were placed in wooden crates and then placed in the fish box.

Q Who placed them in the fish box?

A I believe myself and some of the crew. I'm not a hundred percent sure on that, but the crates were placed in the fish box.

Q The crates were, or the fish were?

A The fish inside the crates were placed in the crates, and then they were placed in the fish box.

Q Was any ice—do you know if any ice was applied to the crates by crew members?

A I do not recall.

Q Was that not your job?

A No, sir, it was not.

Q It would have been the—

MR. DEROVANESIAN: Objection, leading.

THE COURT: Sustained.

Q Whose job would it have been to apply the ice to the crates? And the fish.

A In my—in my belief, the fish were not marketable fish, so whether or not they were iced or not was not my decision.

Q What do you mean by not marketable?

* * * *

[99] MR. MICHELLAND: I think I asked him if the fish were marked, tagged in any sort of way, and then why not.

THE COURT: The witness can explain why not, but he cannot elicit or repeat conversation with others. So, to that extent, the objection is sustained; but he may explain why something occurred or did not occur.

The WITNESS: Lieutenant Mazzeo contacted me, and advised me to place the fish—

MR. DEROVANESIAN: Objection, Your Honor.

THE COURT: The objection is sustained.

BY MR. MICHELLAND:

Q Did you receive instructions from anybody else as to what to do?

A Yes, I was.

Q And what did you then do?

A By my supervisor.

Q And what did you do?

A He directed me to place the fish in the fish box.

MR. DEROVANESIAN: Objection, Your Honor.

THE COURT: The objection is sustained, and the answer is stricken. You may not tell this jury what someone else told you outside this courtroom.

You may proceed.

BY MR. MICHELLAND:

Q Did you have anything on board the FWC boat that [100] would have allowed to you mark, tag, or seal off—mark or tag the fish, or seal off the compartment that contained the undersize fish?

A Yes.

Q What did you have?

A Red evidence tape.

Q Did you attempt to try to apply any evidence tape to the area where the fish were—the undersize fish were stored in their crates?

A Yes, we did.

Q And what happened?

A It wouldn't stick, and it would seal off the entire cooler.

Q Which means what?

A It would not allow access of the fisherman to their food and drink, and to maintain the wholesomeness of their legal catch.

Q To maintain the wholesomeness of their illegal catch?

A Of their legal catch.

Q And what did you understand or believe would happen with the illegal catch?

A It was my belief that they were to return to the dock with the illegal fish, or the undersize red grouper, that were in the fish crates and the fish box.

Q But what would ultimately happen to those?

[101] A They would be destroyed.

Q What did you inform Mr. Yates, in any way, of what he was supposed to do with these undersize fish?

A Yes, I did.

Q What did you tell him?

A I told him that he was to leave the fish in the wooden crates, in the fish box, and return to the dock. I asked him when he was going to return to the dock, and he said he was going to have to return the following day because he was out of ice, or getting low on ice, unless he could get somebody to bring him some.

Q So I'm not sure about if—I'm a little confused about the red tape. You gave two reasons: Tape wouldn't stick, but also it would seal off some of the other compartments?

A That is correct.

Q Did you realize that after you started trying to apply it?

A Yes, sir.

Q But were you able to see, before, what else was in the compartment?

MR. DEROVANESIAN: Objection as to leading.

A Yes, sir, I was.

THE COURT: Hand on a second.

Say it again, please?

[102] MR. DEROVANESIAN: Objection, leading.

THE COURT: Sustained.

BY MR. MICHELLAND:

Q Explain the tape—if one of the reasons was that—was because the tape would seal off other compartments, why would you even attempt to put tape on there?

A That's typically what we do. But I didn't take into account, until after it was brought up, that they would not have access to their fish, to maintain ice on the fish or their food. It was a point well taken.

Q And then you decided not to tape it off.

A That is correct.

Q Do you know if the Miss Katie returned to port the next day?

A No, I do not.

Q Did the defendant say where he was from, and where he would be returning to?

A I do not recall.

Q Did you direct the defendant to return to a particular port?

A No, I did not.

Q So how was the defendant . . . how did you know that there would be people there to meet—or . . . . Was the case still under investigation, sir?

MR. DEROVANESIAN: Objection, leading.

[104] A I did not.

Q Did someone else do that?

A Yes, they did.

Q Who was that?

A Lieutenant Mazzeo.

Q And you do not know what Lieutenant Mazzeo knew or did not know with respect to where the defendant was going to return to.

A That is correct.

Q Did the defendant and the Miss Katie ultimately return to a port in Cortez, Florida?

A Yes, they did.

Q Were you present when the boat returned to that port?

A No, I was not.

Q Did you arrive at a later date? And find where the boat was located?

A Yes, I did.

Q What date was that, sir?

A I do not recall.

Q Was it a few days later?

A Yes, it was.

Q And was that in Cortez, Florida?

A Yes, sir, it was.

Q Is that in Manatee County?

A I believe it is, sir.

[105] Q Is it in the Middle District of Florida?

A Yes, it is.

Q What was your purpose for going to that port on a later date?

A To reinspect the fish at the dock. To be there when they took the fish off the boat.

Q Why were you to do that?

A I was contacted by NOAA fisheries agents and requested to do so.

Q Was the investigation of these fish still pending when you were contacted to reinspect the fish?

MR. DEROVANESIAN: Objection, calls for hearsay.

THE COURT: Overruled.

A Yes, they were.

Q Do you recall whether or not the fish were reinspected by you on August 27th of 2007?

A Yes, they were.

Q Can you explain what your duties—or what you did at that time, sir?

A My duties were to remeasure the fish, inspect the fish as they came off the conveyor belt.

Q When were you on—I'm just going to jump back to the 23rd of August, when you boarded. Did you take any pictures, or did anyone else take any pictures?

A Yes, they did.

[106] Q Who took the pictures?

A I believe Officer Loyed took the photographs.

Q Were there any photographs taken of . . . . Were there any photographs of the measurements of the undersize fish?

A No.

Q Just photographs of some of the other items on the boat, including the hanging bait?

A Yes, sir.

Q Were there—when you went to the Cortez, Florida port, was that in the area of a . . . fish wholesaler called A.P. Bell?

A Yes, it was.

Q Were there any—when you arrived there, were there any other officers from any other agencies, or any other officers from FWC there?

A Yes, there were.

Q Do you remember who was present?

A Myself, Lieutenant Mazzeo, Officer Eddie Chambers, and there were some National Marine Fisheries agents there. And I believe some members of the United States Coast Guard.

Q Does the Coast Guard also—or did the Coast Guard also have authority to seize these fish? If you know.

A Yes, they do.

Q Can you explain the process that occurred on that day [107] with respect to the fish being measured by you?

A The fish were removed from the boat, placed on a conveyor—a metal conveyor that brings them up to the fish house, and it was there that I was—same

as on the boat, I was visually inspecting the fish; and the ones that appeared to be short, or needed to be measured for compliance, were pulled to the side. And checked.

Q When you first arrived, had the fish already been removed from the boat? If you know.

A I don't believe they had been removed. They were in the process of preparing the gear to conveyor the fish off the boat.

Q And how soon after you were arrived did you begin remeasuring the fish? Approximately.

A Probably around 15 to 20 minutes after my arrival.

Q What, if any, measuring board did you use this time around?

A We used a measuring board that Lieutenant Mazzeo brought with him.

Q How many times did you measure the fish?

A The fish off the conveyor belt?

Q Yes.

A Once.

Q New, the fish that were measured, were they all the fish on the Miss Katie, or were they the fish that were only [108] in the crates that had been placed in the hold? If you know.

A I can't answer that question. I measured fish that were brought off the boat.

Q When you measured the fish that were brought off the boat, did you instruct anybody as to what fish to bring to you?

A No, I did not.

Q Did you have any conversations with anybody about that?

A No, I did not.

Q Did you use the same method for measuring those fish as you did on August 23rd of 2007?

A Yes, I did.

Q The fish that you measured, what form were they in? Or were they in any form that was different from what you saw on the 23rd?

A No, sir, they were not.

Q Were they frozen?

A No, they were not.

Q Were they cold?

A Yes, they were.

Q Did you press the face of the fish into the board during—in your measuring process, sir?

A No, sir, I did not.

[109] Q Did you record the measurements of the fish that you did measure of the ones that were 20 inches or below?

A I did not.

Q Did somebody else record them?

A That is correct.

Q Who was that?

A Fisheries Agent Kelly Moran.

Q Did you call the numbers out to Kelly Moran?

A Yes, sir, I did.

Q And where was Kelly Moran in relation to where you were when you called those numbers out?

A I don't recall. I believe she was standing to my immediate right.

Q Did Kelly Moran express any difficulty in hearing what you were saying to her?

A No, sir.

Q Now, were you pulling these fish right off the conveyor belt?

A Yes, sir, I was.

Q Were you measuring them?

A Yes, sir.

Q And then calling out the number? And then what would you do with the fish?

A Placing them in wooden crates.

Q Please take a look at Exhibit Number 2 for [110] identification, and I ask you if you can identify it sir.

A It is a fish measurement form. Fish measurement verification form.

Q And did you sign that form, sir?

A Yes, I did.

Q Was that after you . . . all the fish measurements had been documented on the form?

A Yes, sir.

Q Is it a fair and accurate representation of the form that you signed on the 27th of August—

A Yes, sir, it is.

Q —of 2007?

I would offer Exhibit 2 into evidence at this time.

THE COURT: Any objection to Exhibit 2?

MR. DEROVANESIAN: Yes, sir. May I inquire?

THE COURT: You may.

VOIR DIRE EXAMINATION

BY MR. DEROVANESIAN:

Q Good morning again?

A Good morning, sir.

Q Regarding Government's Exhibit Number 2, you were doing the measurement; is that correct?

A That is correct, sir.

Q And you were using the same method that you had used previously at sea; is that correct?

* * * *

[121] (Government's Exhibit 2 was admitted into evidence.)

BY MR. MICHELLAND:

Q Officer, can you tell us—I don't know if I asked you this already, but was the methodology that you used on the 23rd the same as on the 27th with respect to measuring of the fish?

A Yes, sir.

Q Or the red grouper. Except for the fact that you'd allowed no benefit-of-the-doubt fish to be considered as legal fish on the 27th?

A That is correct.

Q Were all the benefit-of-the-doubt fish below . . . or the ones that could have been—were all the fish that you determined to be illegal on Government's Exhibit Number 2, were they all below 20 inches?

A Yes, sir, they were.

Q How many red grouper did you document, on the 27th, to be below 20 inches?

A 69.

Q Did you find any other discrepancies between—from the—the 8/23/2007 measurement form with the form from the 27th?

A Yes, sir, I did.

Q What did you find, sir?

[122] A The thing that I noticed that—of the fish that were measured on the 27th, none were in that 18 to 18 and three quarter mark, as previously found on the 23rd; and the number of fish that were 19 inches were also not present.

Q Meaning the same number.

A Correct.

Q What did these discrepancies mean to you on the 27th?

A Based on my training and experience in having measured the fish, I felt that these perhaps were not the same fish, or some fish were added to the catch between the 23rd and the 27th. There was such a big difference in the numbers of the undersize.

Q Well, if there were 72 fish on the 23rd, and 69 on the 27th were undersized, how could any fish have been added?

A I'm talking about the size of the fish themselves. If you look at the measurements form on the 27th, more of the fish were closer to the 20 than what we found on the 23rd.

Q And what does that tell you concerning whether or not fish were—red grouper were added, or replaced?

MR. DEROVANESIAN: Objection, calls for speculation?

THE COURT: Overruled.

A I would have to say that some fish were added or [123] replaced.

Q Well, again, there were more fish on the 23rd than there were on the 27th, so if you added fish, you would have a larger number of smaller fish.

A That is correct. I'm making reference to the fish that were under the 20 inches. Based on what I measured—

Q What I'm talking about is the—

THE COURT: Let him finish his answer.

MR. MICHELLAND: I'm sorry, Your Honor.

Go ahead.

THE WITNESS: The only thing I can testify to is that, of the fish that I measured that were under 20 inches on the 27th, based on what I remember, that there was a large discrepancy in the size . . . the lengths of inches on some of the undersize fish. Not so much total numbers, I wasn't really concerning myself with total numbers as I was that there weren't the same number of short fish, as far as the number of 19-inch ones, the number of 18 and three quarters, some

of the 18 and a halfs. It seemed like the fish on the 27th, while undersize, were much larger.

Q And so what did you think happened to the fish that were under—in the 18-inch range or the low 19-inch range, or 19 inches, what did you think happened to those fish?

MR. DEROVANESIAN: Objection, calls for speculation, and asked and answered.

[124] THE COURT: Overruled.

A Those fish were not present.

Q So they had to have been discarded. At least you believe that.

MR. DEROVANESIAN: Objection, leading .

THE COURT: Sustained.

BY MR. MICHELLAND:

Q Given the fact that those fish were not present, what did you conclude, sir?

A That they were not present for inspection. I mean, I could speculate, based on my training and experience, that perhaps the fish were offloaded somewhere else, or were discarded.

MR. DEROVANESIAN: Objection to the speculation and move to strike.

THE COURT: Sustained, granted.

The jury will be instructed not to consider that response.

BY MR. MICHELLAND:

Q Is it typical, or common, to find such discrepancies in size after you measure fish, red grouper, and then have done it again at a later time?

A I've never had occasion to remeasure fish again at the dock.

Q Are you aware of any facts or circumstances that [125] would account for the size difference of the red grouper for the undersize fish from the 23rd to the 27th?

A No, sir.

Q In your training and experience, is it possible that fish could have stretched, or grown, while they were dead fish, so to have stretched on the days between the 23rd and 27th?

MR. DEROVANESIAN: Objection, calls for an expert opinion.

THE COURT: Overruled.

A Could you rephrase the question, or reask the question, please, sir.

Q In your training and experience, is it possible that the red grouper could have stretched in the four days between the 23rd and the 27th?

A No, sir.

Q Was anyone present during your measurements on August 27th of 2007?

A I didn't hear the beginning of the question, sir.

* * * *

[126] Q Did the defendant or his wife object in any way to the method you were using to measure the fish?

A I believe they did.

Q And do you recall whether the defendant objected, himself?

A I remember his—I believe his wife objected. I can't say whether or not I remember the defendant.

Q Do you recall how he objected, or what he said?

A No, I do not. I was focusing my attention on the measuring of the fish.

Q Did you ask him to sign the catch measurement form, Government's Exhibit Number 2?

A On the 27th? No, sir.

Q But he did initial, in fact, in the column that says, "Disagree," each one of those fish; is that right?

MR. DEROVANESIAN: Objection, leading.

THE COURT: Sustained.

BY MR. MICHELLAND:

Q On that form, sir, is there a column for whether Mr. Yates agreed or disagreed with the measurement?

A Yes, sir.

Q And—

[127] THE COURT: Which form is that, please?

MR. MICHELLAND: Exhibit Number 2, I'm sorry, Your Honor.

THE COURT: All right.

BY MR. MICHELLAND:

Q On Exhibit Number 2, does the defendant indicate by initials whether he agrees or disagrees?

A I cannot state otherwise. Like I said, I called the numbers out to Agent Moran, and she wrote the numbers down. And as far as that being his signature, I can't testify as to whether or not that is or is not his signature.

Q You can't testify if that's his initials?

A That's correct.

Q But there are some initials there?

A Yes, sir, there are.

* * * *

[137] Q And on the 23rd of August, 2007, when you did this, were you aware that federal law permitted the mouth of the fish to be open, as well, whichever gave the longest overall length? Were you aware of the law then?

A Yes, sir.

Q And, notwithstanding that, you still didn't measure any of these fish with the mouth open; is that correct?

A No, sir.

* * * *

[142] BY MR. DEROVANESIAN:

Q Were you familiar with the federal law on August 23rd, 2007?

A Yes, I was.

Q All right. At the time of this offense, you knew that the law permitted a measurement with the mouth open or closed, the tail pinched, or relaxed, whichever resulted in the greatest overall length of the catch. You knew that that was the law. Is that correct?

A I realize that the . . . the federal rule was to give the total overall length; yes, sir.

Q That wasn't my question, sir. At the time that you measured this catch on August 23rd, year 2007, were you aware that federal law permitted that the fish, the

mouth could be open or closed, the tail pinched or relaxed, and that the fish was to be measured in whichever way resulted in the greatest overall length? Were you aware that that [143] was the federal law that applied at the time that you measured these fish?

A Yes, sir, I was.

Q And, notwithstanding that, you did not apply the law; is that correct?

A Based on my training and experience, I applied the greatest practical way to give him the greatest length of that fish.

Q Now, you testified that you've been employed in law enforcement previously; is that correct?

A No, I did not.

Q Well, you indicated that you had law enforcement credentials; is that correct?

A Yes, sir, I did.

Q And you got training with the FDLE. Could you explain what the FDLE is?

A As I testified to earlier, it's the Florida Department of Law Enforcement. It's the governing agency that regulates all state-certified law enforcement officers; state, or county, or municipalities. They also, as I testified to, they regulate training, mandated training and additional training.

Q And you had training with the Florida Marine Patrol Academy as well?

A Yes, sir.

[144] Q And not only that, you're a field supervisor; is that correct?

A That is correct.

Q And based on all that training and experience in law enforcement, training and experience through the FDLE, you do whatever is easiest for you, notwithstanding what the law is?

MR. MICHELLAND: Objection, Your Honor. He's misstating the evidence. I don't think he testified to that.

THE COURT: Overruled. It's cross-examination.

BY MR. DEROVANESIAN:

Q You do whatever is easiest, notwithstanding the law; is that correct?

A No, sir, that's not what I testified.

Q You testified that you would otherwise come up with inconsistent results; isn't that what you said?

A Yes, sir.

Q It would be an inaccurate way to measure the fish; correct?

A Yes, sir. I believe so.

Q And based on your own beliefs, or the way you measured them on the 23rd, you didn't measure them pursuant to federal law; correct?

A That is correct.

* * * *

[175] DIRECT EXAMINATION [JAMES KEJONEN]

BY MR. MICHELLAND:

Q Sir, what do you do for a living?

A I'm a special agent with NOAA office of law enforcement.

Q Could you explain to the members of the jury what NOAA is, what the office of law enforcement is, and if there is a subagency, or an agency that's part of NOAA, that you work for?

A Yes. I work for the National Oceanic and Atmospheric Administration, and National Marine Fisheries Service is a division of NOAA under the Department of Commerce.

Q What does the National Marine Fisheries Service do?

A We enforce laws that were enacted to protect our nation's living marine resources.

Q Is the National Marine Fisheries Service an agency of the United States?

A Yes, it is.

Q And is it an agency that's part of NOAA?

A Yes, it is.

Q Is NOAA a part of the executive branch of the United States?

A Yes, it is.

* * * *

[179] BY MR. MICHELLAND:

Q Agent, did you receive information that there was a boat that had returned to Cortez that had undersize red [180] grouper on it?

A Yes, I did.

Q With that information, what did you do?

A I traveled—I left my residence and traveled to Cortez, to A.P. Bell Fish House to meet the vessel.

Q Were you with anyone else when you traveled to the fish house?

A No.

Q Did you meet anyone else that's in law enforcement, or that was in law enforcement at the time, at the fish house at that time?

A Yes. The Coast Guard was there.

Q And do you recall the name of any particular person with the Coast Guard that you went with?

A I believe his first name is Glenn, but his last name is Janzer.

Q Did your duties with respect to that investigation go from the evening of—or late—approximately what time did you go to Cortez, sir?

A I think I arrived there somewhere between . . . probably around 12:30, or maybe like a quarter to 1:00, somewhere in that time frame. I don't think it was later than 1:00 o'clock.

Q And would that have been on the 26th, sir?

A Yeah. That was after midnight, so it would have been [181] the 26th.

Q Did you encounter anyone, other than Glenn Janzer, when you arrived in Cortez at the fish house?

A Yes, I did. There were other Coast Guard personnel there. I didn't have any communication with them. And I also had communication with John Yates.

* * * *

[182] THE COURT: The record may so reflect.

BY MR. MICHELLAND:

Q What conversation, if any, did you have with Mr. Yates, sir?

MR. DEROVANESIAN: Your Honor, I'm going to object to the broad nature of the question in light of prior matters we've discussed.

MR. MICHELLAND: Okay. Your Honor, I'll withdraw that.

BY MR. MICHELLAND:

Q As it relates to undersize red grouper, what conversations did you have, if any, with the defendant?

A When I first approached the vessel, Mr. Yates was upset that the Florida Fish and Wildlife had boarded him, and said that they had no authority to board them in federal waters.

Q Let me just cut you off there. Did the Florida Fish and Wildlife Commission, FWC, have authority to board in federal waters?

A Yes, they did. They operate under what is called the joint enforcement agreement, and they are deputized as federal officers.

Q After Mr. Yates said that, did you respond, and did Mr. Yates say anything else?

A Yes. I explained to him that they did have authority [183] to board his vessel, and then I questioned him about the undersize red grouper.

Q Can you describe his behavior at the time?

A He was pretty upset with the fact that he had been boarded out there.

Q What were your questions with respect to the undersize grouper?

A I had asked him if all the fish that were undersize fish that were measured by the FWC aboard the vessel, and he replied that they were.

Q Was that response material to your investigation, sir?

A Yes, it was.

Q And why is that?

A Because that's what the investigation involved, was undersize red grouper.

Q Was the defendant given any type of opportunity to make a written statement if he wanted?

A Yes. I gave him the opportunity to give a written statement explaining why he had undersize red grouper, and he said that he wanted to give me a statement, but he didn't have his glasses with him, and that he would give me one on Monday, when we did the offload.

Q When you asked the defendant whether or not all the undersize grouper that had been measured by the FWC were on [184] his boat and he said yes, did he make any statement to you that they weren't undersized?

A Yes. He said there was only a few undersize fish and that most of the fish were on the borderline of being legal. And he actually said let me measure a couple of fish and I'll show you. So he opened up the fish box, and I allowed him to measure two fish for me.

Q And what was the lighting like at the time, sir?

A I had a flashlight and I also I believe the lights on the vessel were on.

Q From where were the fish taken that he was—was he permitted to measure the fish?

A Yes, he was.

Q And where were they taken? From where?

A On the port side of the vessel, the forward fish box. That boat had two fish boxes on it. It was the forward fish box, just behind the pilothouse, on the port side of the vessel. And it was the forward corner of the—of that fish box.

Q Do you recall what Mr. Yates used to measure the fish?

A I think he used the measuring board on the boat. I'm not certain, though. I don't absolutely remember for sure.

Q Were you able to see whether or not he was measuring the fish with the mouth opened or the mouth closed?

[185] A That night, no.

Q And were you able to see whether, when he measured the fish, that the mouth of the fish was touching the perpendicular part of the measurement board?

A It would have been—it would have been to the board, yes. Otherwise, it wouldn't have been a correct measurement.

Q Do you know whether it was a correct measurement?

A I can't say. I'm assuming it was or I probably would have noted it.

Q But the fish—and the fish measured . . . do you recall what the measurement of the two fish was?

A I think they were right at 20 inches. At that point I didn't really . . . I knew we were going to measure all the fish eventually, so, I mean, just measuring two fish really was—you know, until we measured all the fish, it really didn't mean that much to me.

Q After the fish were measured by Mr. Yates, were they placed back into the same area from which they came?

A Yes, they were.

* * * *

[198] Q Okay. What is your recollection of those events as you sit here today, sir?

A I remember the fish were measured.

Q Okay. And your report indicates that you were the [199] one that measured the fish; is that correct?

A Yes.

Q And the report indicates that you opened the ice box, and took two fish off the top, and measured them; correct?

A Yes.

Q And that they both measured a 20-inch minimum length for red grouper; is that correct?

A Correct.

Q Now, afterwards, what happened to the two fish?

A They were placed back into the box.

* * * *

[221] A I wasn't exactly watching everything that they were doing, but I knew that they were there, and I seen them there.

Q Did law enforcement ask any one of the crew to do anything for them?

A No.

Q Did they speak to Mr. Yates at any point?

A They talked to Mr. Yates, and he was the only one, because he's the captain.

Q And did Mr. Yates do as he was told, or—to the best of your knowledge.

MR. DEROVANESIAN: Objection to the form.

A Yes.

MR. DEROVANESIAN: I'll withdraw.

THE COURT: All right.

BY MS. CALDARONE:

Q Was Mr. Yates argumentative?

A No.

Q Did Mr. Yates, at any point, tell law enforcement that they were measuring the fish incorrectly on August 23rd?

A I can't remember.

Q Were the illegal undersize fish separated—

A Yes.

Q —by law enforcement?

[222] A Yes.

Q And what did they do with it?

A As they were measuring, they were throwing them in the fish crates, which are boxes about like this.

Q Wooden boxes?

A Wooden crates, yes. With wire. They were put in there, and then they told us to put them in the front hold, and to bring them back. They wasn't going to seize the boat. They said we could go ahead and finish out the day, or finish out the rest of our trip, and, on our way back, bring them in.

Q And who actually placed the fish back into the front hold?

A If I remember correctly, it was Mr. Riopelle.

Q Were they placed on ice?

A Yes, they were.

Q Were they taken out of the crates?

A Yes, they were.

Q And they were just placed into the front hold?

A Um-hum.

Q Was that front hold sealed, or tagged, or marked in any way?

A No, it wasn't.

Q You stated that you were told, by law enforcement, to bring them back to port—

[223] A Um-hum.

Q —is that correct?

A Yes, ma'am.

Q Is that what happened?

A No, ma'am.

Q After law enforcement ended their boarding and left your boat, what happened?

A We pretty much finished out the rest of the day that day. The next morning, we put out one more gear. While Mr. Yates was cooking. After we pulled that one back in, we sat down, and we was eating breakfast. Mr. Yates was sitting on the floor of the cabin, going through his plots. And then he pretty much said that he wasn't stupid, that if the FWC wanted to make sure that the fish were still there, they should have put a mark on their foreheads; and he told Mr. Riopelle and I to throw them overboard.

Q What did you do?

A I immediately got up and did what I was told to do.

Q Which is what?

A Throw the fish overboard.

Q What did you throw overboard?

A I threw the grouper overboard. All the ones that was in the front hold.

Q The undersize fish?

A Yes, ma'am.

[224] Q And why did you do that?

A Because I was told to.

Q After you threw the fish overboard, what happened?

A We started cleaning the whole boat, and we came back in to port.

Q Did Mr. Yates do anything to the fish at that point?

A We segregated other fish.

Q Tell the members of the jury what happened.

A We took more fish out of the bigger ice hold and put into the front hold.

Q Why?

A To make it look like the other fish were still there.

Q Did you throw all of the undersize fish overboard?

A All the ones that was in the front hold, yes, ma'am.

Q All the ones that were separated by law enforcement?

A Yes, ma'am.

Q Was Mr. Yates angry that day?

A I'm sure. I know I was. I was angry that day.

Q Did he say anything else to you that day?

A Just clean the boat, we're going home.

Q And what happened?

A That's exactly what happened, we cleaned the—he was driving the boat all the way back to port. Mr. Riopelle and I were cleaning the boat.

Q How long did it take you to get back to port?

[225] A That whole day.

Q Did Mr. Yates tell you anything else that day? About the undersize fish?

A I don't know.

Q Did he tell you to tell law enforcement anything?

A Yeah. He told me to tell them, like I said, if the fish—if they wanted to make sure the fish were still there, they should have marked them.

Q So he told to you tell law enforcement that those were the same fish?

A Yes, ma'am.

Q When you came back to port, there was an offload of the fish on board; is that correct?

A Not that day there wasn't.

Q Right. Did that occur the next day, the 27th?

MR. DEROVANESIAN: Objection to the leading, Your Honor.

THE COURT: Sustained.

BY MS. CALDARONE:

Q Was there an offload of the fish on board?

A Yeah, there was. All the rest of the fish, yes.

Q When did that occur?

A I don't remember the exact date.

Q Were you present for that?

A Yes, I was.

* * * *

[227] Q And who else helped you?

A Mr. Riopelle.

Q Did you even take the fish that were located in the front hold?

A All the fish.

Q The supposed undersize fish.

A All of the fish.

Q And you placed them all on the conveyor belt?

A Yes.

Q Did you do anything else that day?

A Talked to law enforcement. Again.

Q When you say again, did you ever give a statement to law enforcement before that?

A No. That's just . . . they boarded us one time, and when we got to the fish house, I talked to them.

Q Did they speak to you straightaway after you offloaded this boat?

A Not right away they didn't. It was probably maybe an hour.

Q And what were you doing in between that time?

A Ranting and raving that I wasn't getting paid.

Q Who was present?

A Everybody in the fish house.

Q Did law enforcement come over and speak to you?

A Yes.

[228] Q Did they speak to you in front of anyone?

A No.

Q Where did they speak to you?

A Under a pavilion.

Q Was it just—who was present?

A Me and two other agents.

Q Can you describe who those agents were if you don't know them by name? If you do know them by names, tell us that.

A I only know one, and that's Miss Kelly. That's the only one.

Q Miss Kelly? And she spoke to you?

A Yes, ma'am.

Q Was she nice to you?

A Yes, she was.

Q How long did you speak to Miss Kelly for?

A Maybe 45 minutes to an hour.

Q Did she threaten you in any way?

A No, ma'am.

Q What was the demeanor of the interview?

A She just asked me what had happened. At first, I did tell her what I was told to tell her. And then she pretty much looked at me and told me that I could be facing prison charges if I was lying. And at that time I . . . I had a brand new truck, my wife was pregnant, and I couldn't afford [229] to go to jail; so I went ahead and told her the truth.

Q Did she ask you to write a statement?

A Yes, she did.

Q What did you do?

A I wrote the statement.

Q Did you feel threatened to write a statement?

A No, ma'am.

MS. CALDARONE: If I could have just a moment, Your Honor.

THE COURT: You may.

(Ms. Caldarone confers with Mr. Michelland privately.)

BY MS. CALDARONE:

Q Earlier, you stated when law enforcement boarded your boat, the fish were on ice.

A Yes, they were.

Q Not all of them were on ice for seven days; is that correct?

A There might have been the top couple levels that wasn't on ice for the full seven days.

Q Because you had caught them either that day or the day before?

A Right.

Q Do you see Mr. Yates in court today?

A Yes, I do.

* * * *

[233] Q All right. And what did Mr. Yates tell you about the size of the fish?

A That they had to be over 21 inches.

Q Or what was supposed to happen with them?

A Or they had to be throwed back over.

* * * *

[241] of your jobs was to cook; is that correct?

A Um-hum.

Q So you gave that statement at least twice; is that correct?

A Probably.

Q And your testimony here, today, is that Mr. Yates cooked breakfast. Fair statement?

A Okay. So I forgot. I'm sorry.

Q Now . . . Your testimony here, today, is that you threw the fish overboard; is that correct?

A Yeah.

Q And you testified here, today, that we took the fish out of the main hold and replaced the ones that you threw overboard with the ones from the main hold. Is that your testimony?

A No.

Q That isn't what you just testified to a few moments ago for Ms. Caldarone?

A No. The fish were segregated. The small fish were in the front hold. There were other fish in the main hold. The small fish was the ones that was throwed overboard from the front hold, and we segregated more fish from the main hold into the front hold.

Q When you say, "We," who is, "We"?

A Well, I did. I did it.

[242] Q Okay. So you took more fish out of the main hold, and moved them to the forward hold to segregate them. Is that correct?

A Right. To make them look like the small fish was still there.

Q Let me show you another copy of a sworn statement that you gave under oath regarding this matter.

A All right.

Q Now, that was a sworn statement that you made in front of a federal grand jury; is that correct?

A Probably.

Q When you say probably, is this something you don't remember, or is it—

A I said it.

Q I'm sorry?

A I said it.

Q "It," being?

A The statement, sir.

Q Let me ask you a question. Your testimony is—let me see if I've got it straight. When Ms. Caldarone asked you about it, it was, "We," implying that you—

A Well, everybody on the boat is a team. It was we.

Q Okay.

A Even though I might not have been in the hold doing it, I was on the boat with him when he was doing it.

* * * *

[255] A No.

Q Did you discuss it with any member of the government?

A No.

Q So you have no understanding or agreement with them; is that correct?

A No.

Q So as you sit there right now, you could be charged with this offense based on—

A Charge me.

Q I'm sorry?

A Charge me.

Q Well, I'm not the prosecutor. But you have no understanding or agreement with them?

A No.

Q Now, let me see if I've got this one right. During your testimony for Ms. Caldarone, did you testify that you spoke to a woman that you knew as Kelly? Is that correct?

A Right. She's an agent.

Q With the Marine Fisheries?

A Um-hum.

Q And your testimony is that, "At first I told her what I was supposed to tell her." Is that correct?

A Yes.

Q And when you say, "I told her what I was supposed to tell her," what's that?

[256] A I already told you what I'd said.

Q I'm sorry if I misunderstood or didn't hear you.

A That Mr. Yates told me to tell them that if they wanted to make sure that the fish were there, they should have put a mark on them so that meant that the fish were still there. I was told to tell them that

the fish was there, and if they didn't believe me, they should have—or believe that the fish were there, that they should have marked them to make sure they were still there.

Q And you told Agent Kelly that.

A Yeah, I told them that. I told them that at first.

Q Did she reduce that to writing?

A She didn't write that down, no.

Q She didn't write that down or ask you to sign that one.

A No.

Q But you recall telling her that.

A Yeah.

Q And this was out under the pavilion; is that correct?

A Yes.

MR. DEROVANESIAN: No further questions.

THE COURT: Miss Caldarone, redirect?

MS. CALDARONE: Thank you, Your Honor.

* * * *

[258] A No.

Q Because you did the same thing every day; right?

A Right.

Q And you weren't sure about the times, either; right?

A No, ma'am.

Q No one ever asked you specifically about the times; is that true?

A No, they didn't.

Q Or about the number of sets? Do you remember specifically, every day, how many sets you did?

A No.

Q How many sets you did the morning after the boarding? Or the evening after the boarding?

A I sure don't. I don't.

Q Is that because it was a long time ago?

A Yeah. And they were very long days.

Q You remember testifying in front of the grand jury; right?

A I sure do.

Q Was that a long time ago as well?

A Two or three years ago.

Q And was that closer to the time of the incident?

A Yeah.

Q You testified that you threw the fish overboard; right?

[259] A Um-hum.

Q And who told you to do that?

A Mr. Yates.

Q You also testified that the whole—the hold where the undersize fish was re . . . shall we say fish were added to it?

A Right.

Q After you threw the fish overboard. Is that right?

A Yes.

Q And who told you to do that, as well?

A I'm not saying that I was told to do it. I'm saying that it was done. And I really don't remember if it was me, Mr. Yates, or David Riopelle. But it was done.

Q And why?

A To make it look like the fish were still there.

Q Did Mr. Yates know about that?

A Yes.

Q Was it Mr. Yates that told you to tell the police something different than the truth?

A Yes.

Q Did anyone ever tell you how to testify here, in court, today?

A No.

MS. CALDARONE: If I could have just one second.

THE COURT: You may.

* * * *

Federal case

CITATION

FISH AND WILDLIFE CONSERVATION COMMISSION
DIVISION OF LAW ENFORCEMENT

Citation # 117321 C

State of Florida

In the County Court in and for Federal waters County, Florida

Incident/Summary # Fish Staff 7/97

Court Case #

Date of Arrest 8 23 07 Time of Arrest 4.20 pm Location of Arrest 28° 13 875 / 82° 33.396

Defendant's Name John G. Yates Date of Birth 06-27-52

Address 3932 66 St W Holmes Bch. FL 34217-9006

Sex M Race W Height 5 9 Weight 200 Eyes Blue Hair Brn Scars/Marks ____ FOR Ohio

SPL # & Endorsements 188307 - Y DL # or SS # Y320 972 52 2270 State FL

Vehicle/Vessel Reg./Doc # D0545639 Make Thompson 73 Length 41 9 Type Trawler Color wht

CHARGE 1 Poss 72 w/o Red Grouper Statute / Rule / Special Act ____

CHARGE 2 Grouper not in whole cond. Statute / Rule / Special Act ____

CHARGE 3 Used as bait. Banded R.S. Statute / Rule / Special Act ____

CHARGE 4. ____ Statute / Rule / Special Act ____

Witness Name ____ Address ____ Phone ____

Witness Name ____ Address ____ Phone ____

Co-Defendant ____ Address ____ D.O.B./Age ____ Child ___ Jailed ___

Co-Defendant ____ Address ____ D.O.B./Age ____ Child ___ Jailed ___

RESOURCE EVIDENCE RETURNED ALIVE ___ Yes ___ No DESCRIPTION: ____

RESOURCE EVIDENCE DESTROYED ___ Yes ___ No DESCRIPTION: ____

RESOURCE EVIDENCE DONATED ___ Yes ___ No DESCRIPTION: ____

EVIDENCE RETAINED ___ Yes ___ No DESCRIPTION: ____

WITNESS TO DISPOSAL/DESTRUCTION ____ (Name)

The undersigned certifies and swears that he/she has just and reasonable grounds to believe that the above named Defendant on the 23 day of Aug 20 07 at 1620 hrs (Time) (Military) Federal waters, Gulf of Mexico. committed the following violation of Law: Narrative I observed the commercial vessel, Miss Katie working long line gear at the above position. A fishery inspection of his catch revealed 72 w/o Red Grouper. Grouper was being used as bait on one of the bandit rigs and one shark fin was discovered about the deck.

I swear the above statement is correct and true to the best of my knowledge and belief.

Sworn to and subscribed before me, the undersigned authority

this ____ day of ____ 20__

Officer's Name (Print) Off. Jim Jones

Officer's Signature

Deputy of the Court, Notary, or Law Enforcement Officer

☐ Mandatory appearance in court "Federal" (Date) NOAA. (Time) N.M.F.S (Place of Court)

To be notified

(Location of Court)

☐ You need not appear in court, but must comply with instructions on back. Mail in fine. Amount $ To be set

I agree to appear at the time and place designated above to answer the offense charged or to pay the fine established. I understand that should I willfully fail to appear before the court as required by this notice to appear, that I may be held in contempt of court and sentenced for my arrest shall be issued.

X Defendant's Signature

FWCDLE 0J5 (10/00)

COURT - ORIGINAL

00083

BAG LIMIT/PROHIBITED SPECIES/
UNDERSIZED CATCH MEASUREMENT FORM

Measurement Type
TL = Total Length
FL = Fork Length
LJFL = Lower Jaw-Fork Length (Billfish)

Violation Type
U = Undersized
P = Prohibited Species
B = Bag Limit

EAR No. TL/FL Initials

Fish	Species	(Inches) LJFL			Agree	Disagree	Type
1		19 1/2					
2		19 1/8					
3		19 1/4					
4		19 1/2					
5		19 1/2					
6		19 3/4					
7		19 3/4					
8		19 1/2					
9		19 1/2					
10		19 1/4					
11		19 1/2					
12		19					
13		18 7/8					
14		19 1/4					
15		19 1/4					
16		19 1/2					
17		19 1/2					
18		19 1/2					
19		19					
20		19					
21		19 1/4					

FWC/NOAA Warning

MEASUREMENT MADE BY: _____ FWC
Name/Signature

DATE: 8/23/07 TIME: 1652

ORIGINAL
RETAINED IN
EVIDENCE

00047

BAG LIMIT/PROHIBITED SPECIES
UNDERSIZED CATCH MEASUREMENT FORM

Measurement Type
TL = Total Length
FL = Fork Length
LJFL = Lower Jaw-Fork Length (Billfish)

Violation Type
U = Undersized
P = Prohibited Species
B = Bag Limit

EAR No. TL/FL Initials

Fish	Species	(Inches) TL/FL			Agree	Distance	Type
22		19 3/4					
23		19 1/4					
24		19					
25		19 1/4					
26		19					
27		19 1/4					
28		19 1/2					
29		19 1/4					
30		19					
31		19 1/2					
32		19 1/2					
33		19					
34		19 3/4					
35		19 1/4					
36		19 1/2					
37		19					
38		19 1/4					
39		19					
40		19 1/4					
41		19					
42		19					

FWC/NOAA Warning

MEASUREMENT MADE BY: [signature] FWC.
Name/Signature

DATE: 8/22/19 TIME: 0650

ORIGINAL
RETAINED IN
EVIDENCE

00048

43	19
44	19 3/4
45	18 3/4
46	19
47	19 1/2
48	19
49	19
50	19 1/2
51	19
52	19
53	19
54	19
55	19 3/4
56	19
57	18 7/8
58	19 1/2
59	19
60	19 1/4
61	19 3/4
62	19 1/4
63	19 1/2
64	19
65	19
66	19 1/4
67	19 1/2
68	19 1/4
69	19 3/4
70	19
71	19 1/2
72	19

ORIGINAL
RETAINED IN
EVIDENCE

BAG LIMIT/PROHIBITED SPECIES
UNDERSIZED CATCH MEASUREMENT FORM

Measurement Type
TL - Total Length
FL - Fork Length
LJFL - Lower Jaw-Fork Length (Billfish)

Violation Type
U - Undersized
P - Prohibited Species
B - Bag Limit

EAR Number:

Fish Number	Species/Type	Length (Inches)	TL/FL LJFL	Agree	INITIALS Disagree	Type of Violation
1			19 1/2			
2			19 3/4			
3			19 1/4			
4			19 1/2			
5			19 1/2			
6			19 1/2			
7			19 1/4			
8			19 1/2			
9			19 3/4			
10			19 3/4			
11			19 1/2			
12			19 1/2			
13			19 1/2			
14			19 3/4			
15			19 1/2			
16			19 1/2			
17			19 3/4			
18			19 3/4			
19			19 1/2			
20			19 1/2			
21			19 3/4			
22			19 1/2			

I hereby abandon and relinquish title to the above listed fish to the Government of the United States of America.

Signature

MEASUREMENT MADE BY: [illegible] FWCC F960
Name/Signature

DATE: 8/27/07 TIME: _____

BAG LIMIT/PROHIBITED SPECIES
UNDERSIZED CATCH MEASUREMENT FORM

Measurement Type
TL - Total Length
FL - Fork Length
LJFL - Lower Jaw-Fork Length (Billfish)

Violation Type
U - Undersized
P - Prohibited Species
B - Bag Limit

BAS Number:

Fish Number	Species/Type	Length (Inches)	TL/FL LJFL	Agree	INITIALS Disagree	Type of Violation
23			19			
24			19½			
25			19½			
26			19½			
27			19¼			
28			19¾			
29			19½			
30			19½			
31			19½			
32			19¼			
33			19¾			
34			19¾			
35			19½			
36			19½			
37			19¾			
38			19½			
39			19½			
40			19			
41			19¾			
42			19¾			
43			19⅝			
44			19½			

I hereby abandon and relinquish title to the above listed fish to the Government of the United States of America.

Signature

MEASUREMENT MADE BY: _____ FWCC F464
Name/Signature

DATE: 8/22/00 TIME: _____

BAG LIMIT/PROHIBITED SPECIES,
UNDERSIZED CATCH MEASUREMENT FORM

Measurement Type
TL = Total Length
FL = Fork Length
LJFL = Lower Jaw-Fork Length (Billfish)

Violation Type
U = Undersized
P = Prohibited Species
B = Bag Limit

EAR Number:

Fish Number	Species/Type	Length (Inches)	TL/FL LJFL	Agree	INITIALS Disagree	Type of Violation
45			19½			
46			19			
47			19⅛			
48		19½	[redacted]			
49			19¾			
50			19⅛			
51			19¾			
52			19¾			
53			19¾			
54			19⅛			
55			19¾			
56			19⅛			
57			19⅛			
58			19⅛			
59			19⅛			
60			19¼			
61			19¾			
62			19¾			
63			19⅛			
64			19⅛			
65			19¼			
66			19⅛			

I hereby abandon and relinquish title to the above listed fish to the Government of the United States of America.

Signature

MEASUREMENT MADE BY: [redacted] FWCC F980
Name/Signature

DATE: 8/27/09 TIME: _____

BAG LIMIT/PROHIBITED SPECIES,
UNDERSIZED CATCH MEASUREMENT FORM

Measurement Type
TL = Total Length
FL = Fork Length
LJFL = Lower Jaw-Fork Length (Billfish)

Violation Type
U = Undersized
P = Prohibited Species
B = Bag Limit

EAR Number:

Fish Number	Species/Type	Length (inches)	TL/FL LJFL	Acres	INITIALS Disposed	Type of Violation
67			19½			
68			19¼			
69			19¼			

I hereby abandon and relinquish title to the above listed fish to the Government of the United States of America.

Signature

MEASUREMENT MADE BY: [signature] FWSCC F 913
Name/Signature

DATE: 8/27/07 TIME: _____

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

Case No.: 2:10-CR-66-FtM-29SPC

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOHN L. YATES,
Defendant.

VOLUME THREE OF FOUR

Fort Myers, Florida
August 4, 2011
9:00 a.m.

TRANSCRIPT OF JURY TRIAL, DAY THREE

HELD BEFORE THE HONORABLE
JOHN E. STEELE

UNITED STATES DISTRICT COURT JUDGE

APPEARANCES

FOR PLAINTIFF: Office of the United States Attorney
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BY: Jeffrey Michelland, Esq.
Assistant United States Attorney

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REPORTED BY: Jeffrey G. Thomas, RPR-CP
Official Federal Court Reporter
United States Courthouse
2110 First Street, Suite 2-194
Fort Myers, FL 33901
(239) 461-2033

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* * * *

[ARGUMENT BY MR. DEROVANESIAN]

[38] that was ongoing, in order to be guilty of this offense, the government would have to prove, or establish, that Mr. Yates was, in fact, aware of an ongoing investigation, or the likelihood of one. I would submit to the Court there's been no showing—no evidence presented to show—that Mr. Yates was put on any notice of any type of continuing investigation, or, in

fact, that there would be one. To the contrary, he was issued a citation, told his catch would be seized.

Further, in support of that, I believe it was Mr. Michelland had asked Agent Jones about remeasuring, or how many times he's done that. As I recall, his testimony was that he has never done that. When he's come back to the dock in a case like this, he's never remeasured fish. I submit to the Court that that was his testimony regarding that issue.

If there was, in fact, any investigation, our position is Mr. Yates was not aware of it, and if he took any action, then we would submit to the Court that there is insufficient evidence for that count to proceed because it was not with knowledge that there was any investigation that his action was going to impede.

As an additional matter, as outlined in, again, our request for jury instructions, our position is that 18 United States Code 1519 is a documents offense. Looking at [39] the title, "Destruction, alteration, or falsification of records in federal investigations and bankruptcy," is the title of that section. If the government wished to charge Mr. Yates with other—some other type of destruction of evidence, or some other type of impairment of evidence, our position is that there are sections that would have been appropriate for the government to pursue; but this is not one.

Our position is they have presented no evidence that Mr. Yates did anything to destroy, impair, or damage any type of document or record in this case, and they have not presented sufficient evidence to support their position on this count.

The only reason that I can possibly figure that the government went with this is a reading of it, if you get past the title—which I submit to the Court you

really don't have to—is there is a reference in here to tangible objects. But I submit to the Court that, when you read it, they are talking about notations in tangible objects, such as computer hard drives, log-books, things of that nature. They are not referring to tangible objects as something that can be destroyed as part of an investigation. Our position is that 18 USC 1519 specifically applies to destruction of records and records only.

Interestingly, the cases that we have been able to [40] find on this issue all seem to relate to records and records cases. The history of this statute seems to relate to the Enron case, when there were mass destruction, parties of records and evidence, and that's what this charge relates to.

Our position is that, as to Mr. Yates, the government has failed to present any evidence that this gentleman destroyed any records as part of this case. So, in regard to the Count 2, which is the destruction of records, we would argue to the Court that the government has failed to meet their burden of proof on that count, as well.

Thank you, Your Honor.

THE COURT: All right. With regard to the first two of those three arguments, the Court would find that the Rule 29 motion should be denied. A reasonable jury could find both that there was, indeed, an ongoing investigation, and that the defendant was on notice of that until the evidence is taken back to the port and arrives back at port.

It certainly seems that the investigation is ongoing, and, certainly, if the jury was to credit the testimony of Mr. Lemons about defendant's statement that he's not stupid, and the fish weren't marked, and therefore

he directed Mr. Lemons to throw them overboard, clearly shows the defendant was on notice of the ongoing nature of the investigation.

[41] With regard to the third issue, that is, that 1519 simply doesn't apply to the facts of this case, Mr. Michelland, let me hear from you as to that.

MR. MICHELLAND: Your Honor, the statute reads whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, in any document, or in any tangible object. So, if you take out some of the language, it could read whoever knowingly alters, or destroys, or mutilates any tangible object. The making a false entry does not relate to the tangible object.

You have a number of ways you can commit this crime, and it does not simply require it to be a document or a record. The tangible object is simply something other than a document or a record. Therefore, when you read the totality of the statute, even though it says records, it doesn't necessarily mean it can't be a tangible object. A tangible object can be a fish. And so for those reasons we believe that the statute does apply to this particular case. I don't have any case law that says one way or the other, that it has to be a document or a record.

THE COURT: Isn't there a Latin phrase which means—I'm not good at remembering it—in terms of construction of a statute, something about em paré . . . The gist of it is it means that you take a look at the line of words, and you interpret the words consistently. So if [42] you're talking about documents, and records, tangible objects are tangible objects in the nature of a document or a record, as opposed to a fish.

MR. MICHELLAND: That may be true, but, also, you . . . I wasn't anticipating this particular argument at this time, and so I'm going to need a little time to find some of these Supreme Court types of directions that we're supposed to follow when you look at a statute in terms of statutory interpretation. But given that we've got the word record, document, what kind of tangible objects are we talking about that are similar to records or documents? I mean, there's a record, or there's a document, or there's a tangible object. If they wanted to limit it to records or documents, then they would have said so; but they said a tangible object.

THE COURT: Sure, because they have a tangible object that counts things, for example, and if someone tampers with the odometer, or the counting, that may not be a record or document, but certainly that's a tangible object that can be tampered with, and therefore would presumably fall within the statute.

MR. MICHELLAND: A fish can be tampered with just as well . Something can be done to a fish to change it. Are we talking about machinery or equipment only when we say tangible object?

[43] THE COURT: I don't know. You tell me. The statute has only been in affect since 2002. You said you don't have any cases saying a fish is a record, document, or tangible object. Presumably, there is no case saying a fish isn't either.

MR. MICHELLAND: Your Honor, I haven't checked. I would—I can't say, one way or the other, how this is to be interpreted, but . . . I mean, that's all I have right now, without going downstairs and doing some research on this.

THE COURT: Well, I'm not completely convinced that the title is controlling, but if you look at the title for at least a clue as to what congress meant, it talks about destruction, alteration, or falsification of records in federal investigations. It might be a stretch to say throwing away a fish is a falsification of a record.

* * * *

[DIRECT EXAMINATION
KAREN LEE JANE BELL]

[139] Q And you were held to the same rules and regulations; is that correct?

A Yes.

Q You can't purchase or sell undersize fish; is that correct?

A No.

Q And if you do that, you're subject to penalties as well.

A Yes.

Q And the fish house, direct back to the year 2007, August specifically, if that matters, do you have agents that are frequently in the fish house, inspecting and monitoring the operations?

A Yes.

Q And what type of agents do you commonly see in the fish house?

A FWC, NOAA, and a lot of scientists.

* * * *

[DIRECT EXAMINATION
SANDRA LYNN YATES]

[158] BY MR. DEROVANESIAN:

Q What does your husband do for a living?

A He is a commercial fisherman.

* * * *

[159] August 17th of 2007. Do you recall him leaving for a fishing trip on that date?

A Correct.

Q And do you remember what boat he took that time?

A The Miss Katie.

* * * *

[160] have contact with Mr. Yates when he's out on a boat?

A Well, he takes his cell phone, he turns it off when he leaves. And when he gets within range, he puts it back on, and then he calls.

Q How far out does the cell phone work?

A Not too far. I mean like maybe ten miles max.

Q Did you all have anything else, like a satellite phone?

A We used to. And I don't remember if, at that time, if it had changed over. Because when they gave him these VMH tracking units, they took the sat phones away.

Q How about a radio?

A They do. But I don't have one.

Q So, back in August of 2007, the only way you had to communicate with him was a cell phone?

A Cell phone.

Q All right. And, when he contacted you, you're not sure it if was the Friday or the Saturday night; is that [161] correct?

A I think it was Friday night, because I know we had to go back the next day to ice fish, and I know the fish house was closed on Sunday, and you can't get ice on Sunday.

Q And what happened when he contacted you?

MS. CALDARONE: Objection, calls for hearsay.

THE COURT: I suppose it might. The objection is overruled.

MR. DEROVANESIAN: Yes, sir.

THE COURT: I guess we'll see how it goes.

BY MR. DEROVANESIAN:

Q How long was he out before he called back and contacted you?

A That night.

Q He left on a fishing trip. Did you know how long he was supposed to be on that fishing trip?

A They go for usually 12 to 14 days.

Q And that's what you expected?

A Um-hum. Every time.

Q Now, when he contacted you, you said you weren't sure of the date. Had it been 12 to 14 days?

A No. It had been like a week.

* * * *

[164] Q All right. And did you do that?

A Yes.

Q Do you recall approximately what time it was when you went to pick him up?

A 10:00ish. 9:00 to 10:00 o'clock. Somewhere in that range.

Q And where did you pick him up at?

A A. P. Bell fish house.

Q Let me show you what has been admitted into evidence as Defendant's Exhibit H.

A You go up the ramp here. The boats are parked at the end.

Q Do you recognize what's depicted in Defendant's Exhibit H?

A That's A. P. Bell, and this is the Coast Guard station.

Q All right. Now, when you went to pick up your husband, what did you see when you arrived at A. P. Bell?

A It was—everything was closed. I mean, they basically just get their stuff off the boat, and we leave.

Q Was there anyone else there?

A Night watchman was there, but I didn't see him. I mean, I know he's there, because that's his job. He's a night watchman every night.

* * * *

[169] Q Did anything else happen that evening?

A We got a call from the night watchman saying we had to go down and meet a NOAA officer.

Q And what is a night watchman?

A He's the night watchman at the fish house that basically keeps people off the boats and people off the docks; and if the boat—a boat breaks loose, he's there to make sure—he just watches the fish house and all the boats.

Q All right. You got a call from the night watchman that evening?

A Correct.

Q Do you remember what time it is at this point?

A It was late. I mean almost midnight.

Q All right. What did you all do when you got the call from the night watchman, if anything?

A We went back to the fish house.

Q And who went with you?

A Just John and I, that I remember.

Q Well, when you went back to the fish house, was anybody there?

A The Coast Guard.

* * * *

[176] IN OPEN COURT

BY MR. DEROVANESIAN:

Q Now, Officer Kejonen did, in fact, measure the fish; is that correct?

A He measured two fish; correct.

Q And did he make a statement as to their measurement?

A He said they're 20 inches. They're legal, but they're barely legal.

* * * *

[179] So the date you iced the fish down, did there come a time when you returned to the boat again?

A We came back on Monday morning. This was a Saturday. The fish house is closed on Sunday. We came back on Monday morning.

Q All right. So you iced the fish down the day before Monday; is that correct?

A Two days before Monday. It would be Saturday. Because the fish house is closed on Sunday.

Q All right. And do you recall approximately what time you went to the fish house?

A We were told to be there by 9:00 o'clock. So I'd say a quarter of 9:00. 8:45.

Q And who did you go with?

A John and I went. Only.

Q When you arrived at the fish house, did you see any of the agents there?

A They were getting out of their—the FWC was getting out of their car, and NOAA was getting out of their car

* * * *

[194] Q It's your understanding that that one measured legal; is that correct?

A Correct.

Q What was their reaction when that happened?

A That's when she said that's it, we're done, it's over. And the fish were pulled away and taken away.

Q Now, do you know what happened to all of these fish?

A They sold them to A. P. Bell.

[195] Q Now, the fish that the government indicated didn't measure up, so to speak, did you receive any of the funds for those fish?

A No.

Q Do you know where that money is?

A No. They wrote them a check. It went to NOAA, as far as I know.

Q But the fish were not destroyed? They were actually sold to the fish house?

A They were sold to the fish house. The owner let us remeasure after they left.

Q The owner let you remeasure them after they left. Can you explain that?

A Well, he said he owned them. We asked him. We said we weren't allowed to watch them measure. Can we remeasure the correct way? He said yes.

[196] Q Who is the owner of the fish house?

A Walter Bell.

Q So after all the agents left, Mr. Bell indicated that he had purchased the fish, and the fish were still there; is that correct?

A Right. He pulled the boxes back out and let us remeasure them.

Q And did you do that?

A Correct.

* * * *

[199] Q On that day, August 27th, you were stressed out. You [200] just testified to that. Is that correct?

A Stressed and frustrated.

Q You were argumentative. Isn't that true?

A I didn't think so. At the time, I was questioning. I had a lot of questions. We were asking like could someone else measure the fish. Isn't there a check and balance to this system? The same person that . . . . I assumed that—FWC is bay and inland waters. NOAA was Gulf of Mexico. I thought they would come there for check and balance. That's why we had two agencies there.

And when they left FWC measure them, and then when we stated this is not how saltwater fish, grouper, are measured, we asked could you please one of you guys measure them? And we were just—Mr. Kejonen just ignored me. He wouldn't respond to me.

Q You were demanding of these officers; isn't that correct?

A I'm sorry?

Q You were demanding of these officers; isn't that correct?

A I didn't think so at the time. Even Miss Moran said breath. Relax. It's okay. It's a civil. It's fine.

* * * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

[Filed August 5, 2011]

Case No. 2:10-cr-66-FtM-29SPC

UNITED STATES OF AMERICA

vs.

JOHN L. YATES

Court's Instructions
to the Jury

Members of the Jury:

It's my duty to instruct you on the rules of law that you must use in deciding this case. After I've completed these instructions you will go to the jury room and begin your discussions – what we call your deliberations.

You must decide whether the Government has proved the specific facts necessary to find the Defendant guilty beyond a reasonable doubt.

Your decision must be based only on the evidence presented during the trial. You must not be influenced in any way by either sympathy for or prejudice against the Defendant or the Government.

You must follow the law as I explain it – even if you do not agree with the law – and you must follow all of my instructions as a whole. You must not single out or disregard any of the Court's instructions on the law.

The Indictment or formal charge against a Defendant isn't evidence of guilt. The law presumes every Defendant is innocent. The Defendant does not have to prove his innocence or produce any evidence at all. A Defendant does not have to testify, and if the Defendant chose not to testify, you cannot consider that in any way while making your decision. The Government must prove guilt beyond a reasonable doubt. If it fails to do so, you must find the Defendant not guilty.

The Government's burden of proof is heavy, but it does not have to prove a Defendant's guilt beyond all possible doubt. The Government's proof only has to exclude any "reasonable doubt" concerning the Defendant's guilt.

A "reasonable doubt" is a real doubt, based on your reason and common sense after you've carefully and impartially considered all the evidence in the case.

"Proof beyond a reasonable doubt" is proof so convincing that you would be willing to rely and act on it without hesitation in the most important of your own affairs. If you are convinced that the Defendant has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

As I said before, you must consider only the evidence that I have admitted in the case. Evidence includes the testimony of witnesses and the exhibits admitted. But, anything the lawyers say is not evidence and is not binding on you.

You should not assume from anything I've said that I have any opinion about any factual issue in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own decision about the facts.

Your own recollection and interpretation of the evidence is what matters.

In considering the evidence you may use reasoning and common sense to make deductions and reach conclusions. You should not be concerned about whether the evidence is direct or circumstantial.

"Direct evidence" is the testimony of a person who asserts that he or she has actual knowledge of a fact, such as an eyewitness.

"Circumstantial evidence" is proof of a chain of facts and circumstances that tend to prove or disprove a fact. There is no legal difference in the weight you may give to either direct or circumstantial evidence.

When I say you must consider all the evidence, I do not mean that you must accept all the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision you may believe or disbelieve any witness, in whole or in part. The number of witnesses testifying concerning a particular point does not necessarily matter.

To decide whether you believe any witness, I suggest that you ask yourself a few questions:

- Did the witness impress you as one who was telling the truth?
- Did the witness have any particular reason not to tell the truth?
- Did the witness have a personal interest in the outcome of the case?
- Did the witness seem to have a good memory?

- Did the witness have the opportunity and ability to accurately observe the things he or she testified about?
- Did the witness appear to understand the questions clearly and answer them directly?
- Did the witness's testimony differ from other testimony or other evidence?

You should also ask yourself whether there was evidence that a witness testified falsely about an important fact. And ask whether there was evidence that at some other time a witness said or did something, or didn't say or do something, that was different from the testimony the witness gave during this trial.

But keep in mind that a simple mistake doesn't mean a witness wasn't telling the truth as he or she remembers it. People naturally tend to forget some things or remember them inaccurately. So, if a witness misstated something, you must decide whether it was because of an innocent lapse in memory or an intentional deception. The significance of your decision may depend on whether the misstatement is about an important fact or about an unimportant detail.

When scientific, technical, or other specialized knowledge might be helpful, a person who has special training or experience in that field is allowed to state an opinion about the matter.

But that does not mean you must accept the witness's opinion. As with any other witness's testimony, you must decide for yourself whether to rely upon the opinion.

You have been permitted to take notes during the trial. Most of you – perhaps all of you – have taken advantage of that opportunity.

You must use your notes only as a memory aid during deliberations. You must not give your notes priority over your independent recollection of the evidence. And you must not allow yourself to be unduly influenced by the notes of other jurors.

I emphasize that notes are not entitled to any greater weight than your memories or impressions about the testimony.

The Indictment charges three crimes called "counts." You will be given a copy of the Indictment to refer to during your deliberations.

In sum, Count One charges that on or about August 24, 2007, while within the exclusive economic zone of the United States, before the search for and seizure of undersized fish by a person authorized to make such search and seizure, namely personnel of the United States Coast Guard and the National Marine Fisheries Service, the defendant did knowingly dispose of and throw overboard undersized fish for the purpose of preventing and impairing the Government's lawful authority to take such undersized fish into its custody and control, in violation of Title 18 United States Code, Section 2232(a) and Section 2.

In sum, Count Two charges that on or about August 24, 2007, while within the exclusive economic zone of the United States, the Defendant did knowingly destroy, conceal, and cover up undersized fish with the intent to impede, obstruct, and influence the investigation and proper administration of the catching of red grouper under the legal minimum size limit, a matter within the jurisdiction of the National

Marine Fisheries Service, an agency of the United States, in violation of Title 18, United States Code, Section 1519 and Section 2.

In sum, Count Three charges that on or about August 26, 2007, the Defendant did knowingly and willfully make a materially false, fictitious, and fraudulent statement and representation, that is, that all of the undersized fish measured by the Florida Fish and Wildlife Conservation Commission on August 23, 2007, were aboard the F/V *Miss Katie*, when in truth and in fact as the defendant well knew, he had caused a crewmember to throw overboard the undersized fish, in violation of Title 18, United States Code, Section 1001(a)(2) and Section 2.

As to Count One, it is a Federal crime for any person, before, during, or after any search for or seizure of property by any person authorized to make such search or seizure, to knowingly and willfully destroy, dispose of, or otherwise take any action for the purpose of preventing or impairing the Government's lawful authority to take such property into its custody or control.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) A person was authorized to search for or seize undersized fish at the dock; and

(2) The Defendant knowingly and willfully destroyed or disposed of undersized fish; and

(3) The Defendant had the intent to prevent or impair the Government's lawful authority to take undersized fish into its custody or control.

Officers of the United States Coast Guard and Special Agents and Deputized Officers of the National Marine Fisheries Service are authorized to board, search and inspect a fishing vessel such as the F/V *Miss Katie*, and to seize any fish, wherever found, which are undersized fish, without a warrant in order to enforce federal fishing laws and regulations.

An "undersized fish" is a fish which did not meet the minimum Federal length requirement at the time of its taking. The minimum size limit for red grouper in 2007, at the location where the defendant is alleged to have been fishing, was 20 inches in total length. The method for determining the total length of the red grouper is a straight-line distance from the tip of the snout to the tip of the tail, while it is lying on its side. During that measurement, the mouth of the fish may be either closed or open, and the tail of the fish may be squeezed, whatever gives the fish the greatest overall measurement.

As to Count Two, it is a Federal crime to knowingly destroy, conceal, or cover up any tangible object with the intent to impede, obstruct or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) An agency or department of the United States was engaged in an investigation of a matter within its jurisdiction; and

(2) The Defendant knowingly destroyed, concealed, or covered up undersized fish; and

(3) The Defendant had the intent to impede, obstruct or influence the investigation or proper administration of the catching of red grouper under the legal minimum size limit.

The Government does not have to prove that the investigation was in fact influenced or obstructed or impeded in any way. It only has to prove that the Defendant tried to influence, obstruct, or impede the investigation, and that the natural and probable effect of the Defendant's acts would be to sway, change, or prevent some action likely to be taken in the investigation.

The same definition of undersized fish in Count One applies to Count Two.

As to Counts One and Two, where a statute specifies several alternative ways in which an offense may be committed, the Indictment may allege the several ways in the conjunctive, that is, by using the word "and." However, the applicable statutes in Counts One and Two are worded in the disjunctive, that is, the various modes or methods of violating the statutes are separated by the word "or." So, if you find beyond a reasonable doubt that any one method or way of violating the law occurred, that is sufficient so long as you agree unanimously upon the particular way or method involved.

As to Count Three, it is a Federal crime to willfully make a false or fraudulent statement to a department or agency of the United States.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant made the statement, as charged;

(2) the statement was false;

(3) the falsity concerned a material matter;

(4) the Defendant acted willfully, knowing that the statement was false; and

(5) the false statement was made in a matter within the jurisdiction of a department or agency of the United States.

A statement is "false" when made if it is untrue when made and the person making it knows it is untrue. The Government does not have to show that the Governmental agency or department was, in fact, deceived or misled.

The making of a false statement is not a crime unless the falsity relates to a "material" fact.

A "material fact" is an important fact – not some unimportant or trivial detail – that has a natural tendency to influence or is capable of influencing a decision of a department or agency in reaching a required decision.

It is possible to prove the Defendant guilty of a crime even without evidence that the Defendant personally performed every act charged.

Ordinarily, any act a person can do may be done by directing another person, or "agent." Or it may be done by acting with or under the direction of others.

A Defendant "aids and abets" a person if the Defendant intentionally joins with the person to commit a crime.

A Defendant is criminally responsible for the acts of another person if the Defendant aids and abets the other person. A Defendant is also responsible if the Defendant willfully directs or authorizes the acts of an agent, employee, or other associate.

But finding that a Defendant is criminally responsible for the acts of another person requires proof that the Defendant intentionally associated with or participated in the crime – not just proof that the Defendant was simply present at the scene of a crime or knew about it.

In other words, you must find beyond a reasonable doubt that the Defendant was a willful participant and not merely a knowing spectator.

You will see that the Indictment charges that a crime was committed "on or about" a certain date. The Government does not have to prove that the crime occurred on an exact date. The Government only has to prove beyond a reasonable doubt that the crime was committed on a date reasonably close to the date alleged.

The word "knowingly" means that an act was done voluntarily and intentionally and not because of a mistake or by accident.

The word "willfully" means that the act was committed voluntarily and purposely, with the intent to do something the law forbids; that is, with the bad purpose to disobey or disregard the law. While a person must have acted with the intent to do something the law forbids before you can find that the person acted "willfully," the person need not be aware of the specific law or rule that his conduct may be violating.

Each count of the Indictment charges a separate crime. You must consider each crime and the evidence relating to it separately. If you find the Defendant guilty or not guilty of one crime, that must not affect your verdict for any other crime.

I caution you that the Defendant is on trial only for the specific crimes charged in the Indictment. You are here to determine from the evidence in this case whether the Defendant is guilty or not guilty of those specific crimes.

You must never consider punishment in any way to decide whether the Defendant is guilty. If you find the Defendant guilty, the punishment is for the Judge alone to decide later.

Your verdict, whether guilty or not guilty, must be unanimous – in other words, you must all agree. Your deliberations are secret, and you will never have to explain your verdict to anyone.

Each of you must decide the case for yourself, but only after fully considering the evidence with the other jurors. So you must discuss the case with one another and try to reach an agreement. While you are discussing the case, do not hesitate to reexamine your own opinion and change your mind if you become convinced that you were wrong. But do not give up your honest beliefs just because others think differently or because you simply want to get the case over with.

Remember that, in a very real way, you are judges – judges of the facts. Your only interest is to seek the truth from the evidence in the case.

When you get to the jury room, choose one of your members to act as foreperson. The foreperson will

direct your deliberations and will speak for you in court.

A verdict form has been prepared for your convenience.

[Explain verdict]

Take the verdict form with you to the jury room. When you've all agreed on the verdict, your foreperson must fill in the form, sign it, date it, and carry it. Then you will return it to the courtroom.

If you wish to communicate with me at any time, please write down your message or question and give it to the Court Security Officer. The Court Security Officer will bring it to me and I'll respond as promptly as possible – either in writing or by talking to you in the courtroom. But I caution you not to tell me how many jurors have voted one way or the other at that time.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

[Filed August 8, 2011]

Case No. 2:10-cr-66-FtM-29SPC

UNITED STATES OF AMERICA

vs.

JOHN L. YATES

OPINION AND ORDER

This matter comes before the Court on defendant's motion for judgment of acquittal at the end of the government's case-in-chief on day three of the jury trial. (Doc. #99.) The Court took the motion under advisement pursuant to Fed. R. Crim. P. 29(b) as to Count Two of the Indictment. (*Id.*) For the reasons set forth below, the motion is denied.

Count Two of the Indictment (Doc. #3) charges that on or about August 24, 2007, defendant "did knowingly destroy, conceal, and cover up undersized fish with the intent to impede, obstruct, and influence the investigation and proper administration of the catching of red grouper under the legal minimum size limit, a matter within the jurisdiction of the National Marine Fisheries Service, an agency of the United States," in violation of 18 U.S.C. §§ 1519 and 2. Defendant's motion of judgment of acquittal asserted that this statute is a records-keeping statute aimed solely at destruction of records and documents, and could not

be applied to a situation, as here, where it was fish which were destroyed.

Title 18 U.S.C. § 1519 provides in relevant part that "[w]hoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . ., shall be" in violation of the statute. As pertinent to this case, § 1519 penalizes one who "knowingly . . . destroys, . . . conceals, [or] covers up, . . . any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States." 18 U.S.C. § 1519. The Eleventh Circuit has stated that while § 1519 was passed as part of the Sarbanes-Oxley Act, which was targeted at corporate fraud and executive malfeasance, the broad language of § 1519 is not limited to corporate fraud cases, and "Congress is free to pass laws with language covering areas well beyond the particular crisis *du jour* that initially prompted legislative action." *United States v. Hunt*, 526 F.3d 739, 744 (11th Cir. 2008). Courts have construed the "tangible object" provision to be an independent term which is not simply redundant of "record" or "document." *United States v. Atl. States Cast Iron Pipe Co.*, 612 F. Supp. 2d 453, 539-40 (D.N.J. 2009); *United States v. Russell*, 639 F. Supp. 2d 226, 238 (D. Conn. 2007) (citing cases), overruled on other grounds by, *United States v. Gray*, 642 F.3d 371, 378 n.5 (2d Cir. 2011). Given the nature of the matters within the jurisdiction of the government agency involved in this case, and the broad language of § 1519, the Court finds that a reasonable

jury could determine that a person who throws or causes to be thrown fish overboard in the circumstances of this case is in violation of § 1519.

Accordingly, it is now

ORDERED:

Defendant's motion for judgment of acquittal under Fed. R. Crim. P. 29 made at the conclusion of the government's case in chief as to Count Two is **DENIED**.

DONE AND ORDERED at Fort Myers, Florida, this 8th day of August, 2011.

/s/ John E. Steele
JOHN E. STEELE
United States District Judge

Copies:
Counsel of Record

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FT. MYERS DIVISION

[Filed 12/09/11]

Case Number: 2:10-cr-66-FtM-29SPC
USM Number: 34917-018

UNITED STATES OF AMERICA

-vs-

JOHN L. YATES

Martin DerOvanesian, AFPD
1514 Broadway, Suite 301, Fort Myers, FL 33901

JUDGMENT IN A CRIMINAL CASE

The defendant was found guilty on Count One & Two of the Indictment. Accordingly, the Court has adjudicated the defendant guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. §§ 2232(a) and 2	Destruction or Removal of Property to Prevent Seizure	August 24, 2007	One
18 U.S.C. §§ 1519 and 2	Destruction, Alteration, or Falsification of Records in a Federal Investigation	August 24, 2007	Two

The defendant is sentenced as provided in the following pages of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984, as modified by *United States v. Booker*, 543 US 220 (2005).

The defendant has been found not guilty on Count Three.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the Court and United States Attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Sentence:
December 8, 2011

/s/ John E. Steele
12/9/11

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **30 Days**.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

/s/ _____
United States Marshal

By: _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **Three (3) Years**.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervision that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervision in accordance with the Schedule of

Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. The defendant shall notify the probation officer **at least ten (10) days prior** to any change in residence or employment;
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within **seventy-two (72) hours** of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendants criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

1. The defendant shall provide the Probation Officer access to any requested financial information.

2. Having been convicted of a qualifying felony offense, the defendant shall cooperate with the Probation Office in the collection of DNA, if not already collected by the Bureau of Prisons.

3. The defendant shall refrain from any unlawful use of a controlled substance, and shall submit to one drug test within 15 days of placement on supervised release and a least two periodic drug tests thereafter as directed by the probation officer. Based on the Court's determination that additional drug urinalysis is necessary, the Court authorizes random drug testing not to exceed 104 tests per year.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth in the Schedule of Payments.

Total Assessment	Total Fine	Total Restitution
$200.00 (Due Immediately)	Waived	N/A

The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11-16093

D. C. Docket No. 2:10-cr-00066-JES-SPC-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN L. YATES,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(August 16, 2013)

Before DUBINA, JORDAN and BALDOCK,* *Circuit Judges*.

DUBINA, *Circuit Judge*:

Appellant John L. Yates ("Yates") appeals his convictions for violating 18 U.S.C. §§ 1519 and 2232(a), which arose out of his harvesting undersized

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* Honorable Bobby R. Baldock, United States Circuit Judge for the Tenth Circuit, sitting by designation.

red grouper[1] in federal waters in the Gulf of Mexico. After reviewing the record, reading the parties' briefs, and having the benefit of oral argument, we affirm Yates's convictions.

I.

On August 17, 2007, Yates and his crew prepared the *Miss Katie*, a fishing vessel, for a fishing trip into federal waters in the Gulf of Mexico. On August 23, 2007, John Jones ("Officer Jones"), a field officer with the Florida Fish and Wildlife Conservation Commission, who was deputized by the National Marine Fisheries Service ("Fisheries Service") to enforce federal fisheries laws, was on an offshore patrol with fellow officers when he encountered the *Miss Katie*. Officer Jones noticed the *Miss Katie* was actively engaged in a commercial harvest using long-line fishing gear, so he approached and boarded the *Miss Katie* to inspect for gear, fishery, and boating-safety compliance.

While on board, Officer Jones noticed three red grouper that appeared to be less than 20 inches in length, the minimum size limit for red grouper at that time.[2]

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[1] This opinion uses the terms "red grouper," "grouper," and "fish" interchangeably.

[2] In 2007, federal regulations required that harvested red grouper be a minimum of 20 inches in length. 50 C.F.R. § 622.37(d)(2)(ii) (2007). Total overall length was to be determined by measuring the fish with its mouth open or closed and its tail squeezed or not squeezed, to give the overall greatest length. *See id.* § 622.2 ("Total length . . . means the straight-line distance from the tip of the snout to the tip of the tail (caudal fin), excluding any caudal filament, while the fish is lying on its side.

As a result, Officer Jones decided to measure Yates's fish to determine whether they were of legal size. Officer Jones separated grouper that appeared to be less than 20 inches so he could measure them. He measured the fish with their mouths closed and their tails pinched. Officer Jones gave Yates the benefit of the doubt on the fish that measured close to 20 inches but separated the fish that were clearly under the legal limit and placed those fish in wooden crates. In total, Officer Jones determined that 72 grouper clearly measured less than 20 inches. Officer Jones then placed the wooden crates in the *Miss Katie*'s fish box and issued Yates a citation for the undersized fish. Officer Jones instructed Yates not to disturb the undersized fish and informed Yates that the Fisheries Service would seize the fish upon the *Miss Katie*'s return to port.

Contrary to Officer Jones's directions, Yates instructed his crew to throw the undersized fish overboard. Thomas Lemons ("Lemons"), one of the crewmembers, testified that he complied with Yates's directive. At Yates's prompting, the crew then took other red grouper and placed them in the wooden crates that had held the undersized fish. After the switch was completed, Yates instructed Lemons to tell any law enforcement officers who asked that the fish in the wooden crates were the same fish that Officer Jones had determined were undersized.

After the *Miss Katie* returned to port, Fisheries Service special agent James Kejonen ("Agent Kejonen") traveled to Cortez, Florida to meet Yates and investigate the report of undersized grouper. On

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The mouth of the fish may be closed and/or the tail may be squeezed together to give the greatest overall measurement.").

August 27, 2007, Officer Jones was called in to re-measure the fish, which he did in the same manner as before—mouths closed and tails pinched. Sixty-nine fish measured less than 20 inches. Officer Jones noticed that, although some of Yates's undersized red grouper had previously measured as short as 18 to 19 inches, none of the grouper unloaded at the dock were that short. In fact, at sea, most of Yates's grouper had measured between 19 and 19½ inches, but at the dock, the majority of the grouper measured close to 20 inches. Due to Officer Jones's suspicion that the undersized fish measured on August 27 were not the same fish he had measured on August 23, federal agents interviewed Lemons, who eventually divulged the crew's nefarious conduct.

At trial, Yates disputed whether the red grouper thrown overboard were actually undersized because Officer Jones had only measured the fish with their mouths closed, not open. In other words, Yates argued it was possible that, had the fish been measured with their mouths open, they would have measured legal size. The day before trial, the district court held a *Daubert*[3] hearing to evaluate the qualifications of the two grouper-measuring experts proffered by the parties. The government offered Dr. Richard Cody ("Dr. Cody"), a research administrator with the Fish and Wildlife Research Institute, as a potential expert witness. Dr. Cody was prepared to testify that, on average, a grouper measured three to four millimeters longer when its mouth was open versus when its mouth was closed. Yates did not object to that contention, but he did object to other portions of Dr. Cody's testimony. The district court took Dr. Cody's

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[3] *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 113 S.Ct. 2786 (1993).

testimony under advisement but did not decide whether he could testify as an expert on measuring grouper. The district court also ruled that Yates's expert, William Ward ("Mr. Ward"), research director for the Gulf Fishermen's Association, could offer testimony about a grouper's measurement with an open mouth as opposed to a closed mouth and about fish shrinkage when placed on ice.

Ultimately, the government did not call Dr. Cody as a witness in its case-in-chief. After the government rested, Yates's counsel announced for the first time that he planned to call Dr. Cody as his first witness to testify about the length of grouper with an open mouth versus a closed mouth. The government objected. The district court sustained the government's objection, ruling that Yates was precluded from calling Dr. Cody in his case-in-chief because Yates had failed to properly notify the government of his intention to call Dr. Cody as an expert witness, as required by Federal Rule of Criminal Procedure 16. After the district court had made its ruling, Yates called as his first witness Mr. Ward, who testified that fish can shrink on ice and that grouper measure longer with their mouths open than with their mouths closed. On cross-examination, the government questioned Mr. Ward about his own state and federal fishing violations.

At the conclusion of the government's case-in-chief, and at the close of all the evidence, Yates moved for judgment of acquittal on all counts. The district court denied both motions. After a four-day trial, the jury found Yates guilty of (1) knowingly disposing of undersized fish in order to prevent the government from taking lawful custody and control of them, in violation of 18 U.S.C. § 2232(a) (Count I); and (2) destroying or concealing a "tangible object with the

intent to impede, obstruct, or influence" the government's investigation into harvesting undersized grouper, in violation of 18 U.S.C. § 1519 (Count II). The district court sentenced Yates to 30 days' imprisonment, followed by 36 months' supervised release. Yates timely appealed his convictions.

II.

Yates presents three issues on appeal. First, Yates argues the district court erred in denying his motion for judgment of acquittal on Counts I and II, because the government failed to present sufficient evidence to prove the fish thrown overboard were undersized. Second, Yates argues the district court erred as a matter of law in denying his motion for judgment of acquittal on Count II, because the term "tangible object" as used in 18 U.S.C. § 1519 does not apply to fish. Alternatively, Yates argues the statute is ambiguous and the rule of lenity should apply. Finally, Yates argues the district court abused its discretion by precluding him from calling Dr. Cody during his case-in-chief.

III.

"We review *de novo* a district court's denial of a motion for judgment of acquittal on sufficiency of evidence grounds." *United States v. Pena*, 684 F.3d 1137, 1152 (11th Cir. 2012). "In reviewing the sufficiency of the evidence, we look at the record in the light most favorable to the verdict and draw all reasonable inferences and resolve all questions of credibility in its favor." *United States v. White*, 663 F.3d 1207, 1213 (11th Cir. 2011) (internal quotation marks omitted). We review questions of statutory interpretation *de novo*. *United States v. Aldrich*,

566 F.3d 976, 978 n.2 (11th Cir. 2009). Finally, we review the district court's discovery rulings for abuse of discretion. *Reese v. Herbert*, 527 F.3d 1253, 1262 n.13 (11th Cir. 2008).

IV.

A. Sufficient evidence was presented at trial for the jury to conclude the fish thrown overboard were undersized.[4]

Yates contends that Officer Jones's failure to measure the fish with their mouths open—as opposed to only measuring them with their mouths closed—creates speculation as to whether the fish would have measured undersized with their mouths open. As such, he argues there was not sufficient evidence for the jury to conclude the fish thrown overboard were undersized. We disagree.

First, the testimonial evidence given by Officer Jones, Agent Kejonen, and Mr. Ward conflicts as to whether measuring a fish with its mouth open, as

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[4] While the size of the fish thrown overboard is not an essential element under either 18 U.S.C. § 1519 or § 2232(a), the prosecution failed to object to the district court's charge to the jury regarding the process for determining whether a fish is undersized. Accordingly, establishing that the fish were "undersized" became necessary for conviction pursuant to the "law of the case" doctrine. *See United States v. Spletzer*, 535 F.2d 950, 954 (5th Cir. 1976).[5] Thus, in addressing Yates's argument that the district court should have granted his motion for judgment of acquittal as to Counts I and II, the inquiry is whether sufficient evidence was presented at trial to support the jury's finding that the fish thrown overboard were undersized.

[5] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

opposed to closed, makes a difference in the fish's overall length. The jury was free to weigh the conflicting evidence and decide whether opening or closing a fish's mouth made a large difference, a small difference, or no difference at all in the fish's measurement. *See United States v. Prince*, 883 F.2d 953, 959 n.3 (11th Cir. 1989) ("Weighing the credibility of witnesses . . . is within the province of the jury, and the jury is free to believe or disbelieve any part or all of the testimony of a witness."). Further, Officer Jones testified that while he was on board the *Miss Katie*, Yates scolded his crew for keeping undersized fish and stated, "Look at this fish, it's only 19 inches. How could you miss this one?" [R. 141 at 93.] Similarly, Agent Kejonen testified that, on the dock, Yates admitted to having at least "a few" undersized fish on his boat when Officer Jones measured them days earlier. [*Id.* at 184.] Moreover, that Yates directed his crew to throw the fish overboard creates an inference that he—as an experienced commercial fisherman—believed the fish to be undersized. In sum, a "rational trier of fact could have found . . . beyond a reasonable doubt" that the fish thrown into the Gulf were shorter than the legal limit. *See United States v. Mintmire*, 507 F.3d 1273, 1289 (11th Cir. 2007). Accordingly, we conclude from the record that sufficient evidence was presented at trial for the jury to convict Yates of Counts I and II.

B. A fish is a "tangible object" within the meaning of 18 U.S.C. § 1519.

Yates contends the district court erred in denying his motion for judgment of acquittal as to Count II because the term "tangible object" as used in 18 U.S.C. § 1519 "only applies to records, documents, or tangible

items that relate to recordkeeping" and "does not apply to . . . fish." [Appellant's Br. at 36.]

"In statutory construction, the plain meaning of the statute controls unless the language is ambiguous or leads to absurd results." *United States v. Carrell*, 252 F.3d 1193, 1198 (11th Cir. 2001) (internal quotation marks omitted). "When the text of a statute is plain, . . . we need not concern ourselves with contrary intent or purpose revealed by the legislative history." *United States v. Hunt*, 526 F.3d 739, 744 (11th Cir. 2008). Further, undefined words in a statute—such as "tangible object" in this instance—are given their ordinary or natural meaning. *Smith v. United States*, 508 U.S. 223, 228, 113 S. Ct. 2050, 2054 (1993). In keeping with those principles, we conclude "tangible object," as § 1519 uses that term, unambiguously applies to fish. See BLACK'S LAW DICTIONARY 1592 (9th ed. 2009) (defining "tangible" as "[h]aving or possessing physical form"); *see also United States v. Sullivan*, 578 F.2d 121, 124 (5th Cir. 1978) (noting that cocaine is a "tangible object" subject to examination and inspection under Rule 16(a) of the Rules of Criminal Procedure). Because the statute is unambiguous, we also conclude the rule of lenity does not apply here.

C. Yates's right to present a defense was not prejudiced by the district court's ruling that disallowed Yates from calling Dr. Cody during his case-in-chief.

Because Yates waited until the close of the government's case-in-chief to disclose Dr. Cody as an expert witness, the disclosure was untimely under Federal Rule of Criminal Procedure 16(b)(1)(C). As a sanction for this untimely disclosure, the district court did not allow Dr. Cody to testify during Yates's case-

in-chief. Yates does not dispute that he did not give proper notice to the government pursuant to Rule 16(b)(1)(C). Instead, Yates argues that the district court should have used a lesser sanction to address his late disclosure, and that the district court's outright preclusion of Dr. Cody's testimony at trial infringed on Yates's constitutional right to present a defense. According to Yates, Dr. Cody would have reinforced his expert Mr. Ward's testimony that red grouper measure longer with their mouths open than with their mouths closed. Yates also contends Dr. Cody's corroboration of Mr. Ward's testimony would have countered the government's attempt to discredit Mr. Ward.

"Relief for violations of discovery rules lies within the discretion of the trial court[.]" *United States v. Petrie*, 302 F.3d 1280, 1289 (11th Cir. 2002). To warrant reversal of the court's discretion on appeal, "a defendant must show prejudice to his substantial rights." *Id.* While the right of the accused to present a defense is a substantial right, that right is not boundless. *See Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 653 (1988).

It is unnecessary for us to determine whether the district court properly exercised its discretion in precluding Dr. Cody from testifying at trial, because we conclude Yates has failed to show the preclusion prejudiced his right to present a defense. As Yates conceded in his brief, his expert Mr. Ward offered the same testimony Yates hoped to elicit from Dr. Cody. Indeed, our review of the record shows Dr. Cody's testimony would have been less favorable to Yates than that of Mr. Ward. Moreover, under the circumstances presented here, Yates's inability to offer Dr. Cody's testimony to rehabilitate Dr. Ward's

credibility does not amount to prejudice of his substantial rights.

V.

For the above stated reasons, we affirm Yates's convictions.

AFFIRMED.

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
JUN 30 2014
OFFICE OF THE CLERK

No. 13-7451

In The

Supreme Court of the United States

JOHN L. YATES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF PETITIONER

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June 30, 2014

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QUESTION PRESENTED

The anti-shredding provision of the Sarbanes-Oxley Act criminalizes knowingly altering, destroying, mutilating, concealing, covering up, falsifying, or making a false entry in "any record, document, *or tangible object* with the intent to impede, obstruct, or influence the investigation or proper administration" of any federal matter. *See* 18 U.S.C. § 1519 (2002) (emphasis added). The question presented here is:

> Whether the ordinary or natural meaning of the phrase "tangible object," in light of its surrounding terms and its placement in the Sarbanes-Oxley Act, is a thing used to preserve information, such as a computer, server, or similar storage device.

TABLE OF CONTENTS

Page

Question Presented i

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Statutory Provision Involved 1

Statement of the Case 2

Summary of the Argument 8

Argument 10

The Ordinary Or Natural Meaning Of "Tangible Object," In The Context Of 18 U.S.C. § 1519, Is A Thing Used To Preserve Information, Such As A Computer, Server, Or Similar Storage Device ... 10

A. The ordinary or natural meaning of "tangible object" is based on its context 11

B. In the specific context of its surrounding terms, "tangible object" means a thing used to preserve information, like a computer, server, or similar storage device 16

C. The broader statutory context in which "tangible object" is placed confirms the phrase's meaning as a thing used to preserve information, akin to a computer, server, or similar storage device 19

D. Interpreting "tangible object" to mean a thing used to preserve information, such as a computer, server, or similar storage device, avoids absurd results 23

E. A contextual construction of "tangible object" as a thing used to preserve information, like a computer, server, or similar storage device comports with the rules of constitutional avoidance and lenity 25

Conclusion 28

TABLE OF AUTHORITIES

Cases **Page(s)**

Arthur Andersen LLP v. United States,
544 U.S. 696 (2005) 3, 27

Ashton v. Kentucky,
384 U.S. 195 (1966) 26

Bailey v. United States,
516 U.S. 137 (1995) 19

Bond v. United States,
134 S. Ct. 2077 (2014) 25

Caraco Pharmaceutical Labs, Ltd. v. Nordisk A/S,
132 S. Ct. 1670 (2012) 14

Dolan v. Postal Service,
546 U.S. 481 (2006) 15

Dole v. United Steelworkers of America,
494 U.S. 26 (1990) 16

Federal Aviation Administration v. Cooper,
132 S. Ct. 1441 (2012) 12

Food and Drug Administration v. Brown & Williamson Tobacco Corp.,
529 U.S. 120 (2000) 19

F.W. Fitch Co. v. United States,
323 U.S. 582 (1945) 16

Haggar Co. v. Helvering,
308 U.S. 389 (1940) 23

Immigration and Naturalization Service v. National Center for Immigrants' Rights, Inc.,
502 U.S. 183 (1991) 20

Jarecki v. G. D. Searle & Co.,
367 U.S. 303 (1961) 16, 18

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559 U.S. 133 (2010) 14, 15

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461 U.S. 352 (1983) 26

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134 S. Ct. 1158 (2014) 2, 3, 20

Leocal v. Ashcroft,
543 U.S. 1 (2004) 14

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549 U.S. 47 (2006) 11, 19

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283 U.S. 25 (1931) 11, 12

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483 U.S. 350 (1987) 27

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498 U.S. 479 (1991) 16

Nken v. Holder,
556 U.S. 418 (2009) 15

North Star Steel Co. v. Thomas,
515 U.S. 29 (1995) 12

Paroline v. United States,
134 S. Ct. 1710 (2014) 17

Robinson v. Shell Oil Co.,
519 U.S. 337 (1997) 15

Rowland v. California Men's Colony, Unit II Men's Advisory Council,
506 U.S. 194 (1993) 23

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561 U.S. 358 (2010) 25, 26

Smith v. United States,
508 U.S. 223 (1993) 11

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No. 02-121, 2002 WL 32153945
(S.D. Tex. Mar. 14, 2002) 2, 3, 20

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404 U.S. 336 (1971) 27

United States v. Ressam,
553 U.S. 272 (2008) 11

Washington State Dep't of Social & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371 (2003) 16

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Zadvydas v. Davis, 533 U.S. 678 (2001) 25

Statutes

16 U.S.C. § 1857(1)(A), (G) (2006) 5

16 U.S.C. § 1858(a), (g) (2006) 5

16 U.S.C. § 1859(a) (2006) 5

18 U.S.C. § 152(8) (2000) 3

18 U.S.C. § 245(b) (2006) 24

18 U.S.C. § 505 (2006) 24

18 U.S.C. § 924(e) (2006) 15

18 U.S.C. § 1001(a)(2) (2006) 6, 24

18 U.S.C. § 1503 (2000) 3

18 U.S.C. § 1505 (2006) 24

18 U.S.C. § 1510 (2006) 24

18 U.S.C. § 1512(a), (b) (2000) 3

18 U.S.C. § 1516 (2000) 21

18 U.S.C. § 1517 (2000) 21

18 U.S.C. § 1518 (2000) 21

18 U.S.C. § 1519 (2002) ..... *passim*

18 U.S.C. § 1520 (2002) 21

18 U.S.C. § 2232 (2006) 6, 24

28 U.S.C. § 994(p) (2000) 22

28 U.S.C. § 1254(1) (2012) 1

Pub. L. 107-2014, Title VIII, § 802,
116 Stat. 745 (2002) 10, 20, 21

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116 Stat. 745 (2002) 21

Sarbanes-Oxley Act of 2002,
116 Stat. 745 (2002) 10

Code of Federal Regulations

50 C.F.R. § 622.37(d)(2)(ii) (2007) 4

50 C.F.R. § 622.37(d)(2)(ii) (2014) 4

50 C.F.R. § 622.2 (2007) 4

50 C.F.R. § 622.2 (2014) 4

U.S. Sentencing Guidelines Manual

App. C, amend. 647 (2003) 22

App. C, amend. 653 (2003) 22

§ 2J1.2 (2003) 22

§ 2J1.2 cmt. n.1 (2003) 22

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Dana E. Hill, *Anticipatory Obstruction of Justice: Pre-Emptive Document Destruction Under the Sarbanes-Oxley Anti-Shredding Statute, 18 U.S.C. § 1519*, 89 Cornell L. Rev. 1519 (2004) 2, 3

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Black's Law Dictionary (9th ed. 2009) 7

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 733 F.3d 1059. JA 124-34. The district court's order denying Mr. Yates's motion for a judgment of acquittal is available at 2011 WL 3444093. JA 115-17.

JURISDICTION

The court of appeals entered its judgment on August 16, 2013. Mr. Yates timely filed a petition for a writ of certiorari on November 13, 2013. This Court granted the petition on April 28, 2014. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The anti-shredding provision of the Sarbanes-Oxley Act of 2002 provides:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

18 U.S.C. § 1519 (2002).

STATEMENT OF THE CASE

Petitioner John Yates was convicted under 18 U.S.C. § 1519 for directing his crewmen to throw undersized fish back into the sea, after receiving a civil citation and being told to bring the fish to dock to be destroyed. Section 1519, commonly known as the anti-shredding provision of the Sarbanes-Oxley Act of 2002,[1] criminalizes the destruction, alteration, or falsification of "any record, document, *or tangible object*," with the intent to obstruct or influence the proper administration of any federal matter. 18 U.S.C. § 1519 (emphasis added). Concluding that a fish is a "tangible object," the court below affirmed Mr. Yates's conviction. Mr. Yates seeks reversal of that decision as it is contrary to this Court's precedents, which require that the phrase be interpreted in the context of its surrounding terms and the statutory scheme.

1. The Sarbanes-Oxley Act was enacted in the wake of the Enron Corporation debacle. *See Lawson v. FMR LLC*, 134 S. Ct. 1158, 1161-62 (2014). Before its collapse, Enron was considered the nation's seventh largest corporation based on its reported revenues. *See United States v. Arthur Andersen LLP*, No. 02-121, 2002 WL 32153945, at ¶ 2 (S.D. Tex. Mar. 14, 2002) (indictment). Enron's financial prosperity, however, was largely a ruse perpetrated by Enron and its auditor, Arthur Andersen, which assisted Enron in defrauding its investors and reaping

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[1] *See, e.g.*, Dana E. Hill, *Anticipatory Obstruction of Justice: Pre-Emptive Document Destruction Under the Sarbanes-Oxley Anti-Shredding Statute, 18 U.S.C. § 1519*, 89 Cornell L. Rev. 1519 (2004); *see also* S. Rep. No. 107-146, at 17, 22 (2002).

millions of dollars for certain insiders. *Id.* at ¶ 8. Anticipating an imminent investigation, Enron and Arthur Andersen devised and orchestrated a plan to purge Enron's corporate records under the guise of enforcing Enron's document retention policy. *Id.* at ¶¶ 5, 9-11. The purge was not limited to the tons of paper records and documents that were shredded; it extended to the computer hard drives and the email system that preserved any documentation relating to Enron. *Id.* at ¶ 10; *see also Arthur Andersen LLP v. United States*, 544 U.S. 696, 698-702 (2005).

Federal obstruction of justice statutes in effect at the time did not criminalize the destruction of documents *prior* to the onset of an official federal investigation. *See generally* 18 U.S.C. §§ 152(8), 1503, 1512(a), (b) (2000).[2] Then-existing laws thus proved to be inadequate to hold Arthur Andersen criminally responsible for its involvement in the document-shredding scandal. *See Arthur Andersen LLP*, 544 U.S. at 702, 706-08. Hence, Congress passed the Sarbanes-Oxley Act to "prevent and punish corporate and criminal fraud, protect the victims of such fraud, preserve evidence of such fraud, and hold wrongdoers accountable for their actions." *Lawson*, 134 S. Ct. at 1162 (quoting S. Rep. No. 107-146 at 2 (2002)); *see also id.* at 1161 ("To safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation, Congress enacted the Sarbanes-Oxley Act of 2002, 116 Stat. 745.").

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[2] *See also* Hill, *supra* note 1.

2. Mr. Yates, a commercial fisherman, was employed as the captain of the *Miss Katie*. JA 25, 96, 125. On August 23, 2007, when the *Miss Katie* was six days into a commercial harvest of red grouper in the Gulf of Mexico, a Florida Fish and Wildlife Conservation Commission officer boarded the boat to conduct a routine inspection in federal waters. JA 22-25, 125. The officer was federally deputized to enforce size limits for fish by the National Marine Fisheries Service, which is a division of the National Oceanic and Atmospheric Administration under the Department of Commerce. JA 13, 61.

In 2007, federal law required that harvested red grouper be at least 20 inches in length. JA 31, 109, 125 & n.2; 50 C.F.R. § 622.37(d)(2)(ii) (2007).[3] While aboard the *Miss Katie*, the FWC officer noticed three red grouper that appeared to be smaller than 20 inches. JA 23-24, 125. After visually inspecting the grouper harvested by the *Miss Katie*'s crew and finding some were "obviously well oversize," the officer measured the grouper that appeared to him to be less than 20 inches long. JA 26-27, 126.

Federal law requires that fish be measured with their mouth open, their mouth closed, their tail pinched, and their tail not pinched, whichever combination yields the "greatest overall measurement." JA 58-59, 109, 125-26 n.2; *see also* 50 C.F.R. § 622.2 (2007).[4] The officer, however, opted only to measure the fish with their mouth closed and

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[3] The regulation has since been amended to reduce the size limit for grouper to 18 inches. *See* 50 C.F.R. § 622.37(d)(2)(ii) (2014).

[4] This regulation has not changed. *See* 50 C.F.R. § 622.2 (2014).

their tail pinched. JA 30, 59, 126. Using that method, he determined that 72 grouper measured between 18-3/4 and 19-3/4 inches. JA 31, 82-84, 126.

Harvesting undersized fish is not a crime; rather, it is a civil violation punishable by a fine or fishing license suspension. *See* 16 U.S.C. §§ 1857(1) (A), (G), 1858(a), (g), 1859(a) (2006). The officer thus issued Mr. Yates a civil citation for harvesting 72 undersized grouper. JA 41, 81, 126. The undersized fish were placed in crates in the *Miss Katie*'s fish box. JA 41. The officer told Mr. Yates to leave them there and return to dock, where the fish would be seized and destroyed. JA 44, 126.

Two days after the *Miss Katie* returned to dock, the officer re-measured the fish in the same manner as he had at sea. JA 46-51, 100, 125-26 & n.2, 127. This time, he determined that 69 (rather than 72) fish measured less than 20 inches. JA 53-54, 126-27. He also found that the majority of the fish at dock measured close to 20 inches long; whereas, a majority at sea measured closer to 19 to 19-1/2 inches. JA 53-55, 127.

The officer, although he had never previously re-measured fish at dock, surmised that the discrepancies in his measurements meant that the fish he measured at dock were not the same fish he had measured at sea. JA 53-56, 127. His suspicions were later supported by one of the *Miss Katie*'s crewmen, who told federal agents that Mr. Yates had directed the crew to throw the undersized fish overboard and to replace them with fish of legal size. JA 69-70, 127.

3. In 2010, Mr. Yates was indicted for violating 18 U.S.C. § 2232(a), by throwing undersized fish overboard to prevent the government from taking the fish into its custody, and with violating 18 U.S.C. § 1001(a)(2), by falsely stating to federal agents that all the undersized fish the officer measured at sea were aboard the *Miss Katie* at dock. JA 6-8. Additionally, he was charged with violating the anti-shredding provision of the Sarbanes-Oxley Act, 18 U.S.C. § 1519, by destroying, concealing, and covering up "undersized fish with the intent to impede, obstruct, and influence the investigation and proper administration of the catching of red grouper under the legal minimum size limit." JA 7.

During his jury trial, Mr. Yates moved for a judgment of acquittal at the conclusion of the government's case-in-chief and of all evidence. He argued that when "tangible object" is read in the context of § 1519, the phrase means things akin to records and documents, in which "notations" can be made, such as "computer hard drives, logbooks, [and] things of that nature." JA 90-92.

The district court initially questioned whether fish fell within the meaning of "tangible object" for purposes of § 1519. Referencing the canon of statutory construction that a series of words must be interpreted consistently, the court stated, "So if you're talking about documents, and records, tangible objects are tangible objects in the nature of a document or a record, as opposed to a fish." JA 93. The court expounded, "if you look at the title for at least a clue as to what congress meant, it talks about destruction, alteration, or falsification of records in federal investigations. It might be a stretch to say

throwing away a fish is a falsification of a record." JA 95.

After taking the matter under advisement, the district court entered a written order that did not mention these concerns. Instead, the court denied the motion, relying on "the nature of the matters within the jurisdiction of the government agency involved in this case, and the broad language of § 1519," to conclude that "a reasonable jury could determine that a person who throws or causes to be thrown fish overboard in the circumstances of this case is in violation of § 1519." JA 116-17.

The jury acquitted Mr. Yates on the false-statement count, but convicted him on the other two counts. JA 6-8, 118-19. The district court sentenced Mr. Yates to 30 days' imprisonment, to be followed by three years' supervised release. JA 119-20.

4. The Eleventh Circuit Court of Appeals affirmed Mr. Yates's conviction for violating § 1519. JA 134. The appellate court began by quoting case law stating that the plain meaning of a statute controls and that undefined words are given their ordinary or natural meaning. JA 132. "In keeping with those principles," the court summarily concluded, "'tangible object,' as § 1519 uses that term, unambiguously applies to fish." JA 132 (citing *Black's Law Dictionary* 1592 (9th ed. 2009) (defining "tangible" as "[h]aving or possessing physical form")). The court added, "Because the statute is unambiguous, we also conclude the rule of lenity does not apply here." JA 132.

SUMMARY OF THE ARGUMENT

Enacted in the wake of the Enron document-shredding scandal, the anti-shredding provision of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1519, criminalizes the destruction of "any record, document, or *tangible object*." For purposes of this provision, "tangible object" means a thing used to preserve information, such as a computer, server, or similar storage device.

This construction follows from this Court's precedents, which dictate that an undefined statutory phrase – such as "tangible object" here – be ascribed its ordinary or natural meaning in everyday usage. The ordinary or natural meaning of "tangible object" necessarily depends on the context in which the phrase is used. Indeed, the dictionary definitions of "tangible" and "object" are so general that the phrase "tangible object" is chameleon-like, meaning different things in different contexts.

To ascertain the meaning of the phrase "tangible object" as used in § 1519, then, the phrase must be read in the context of its surrounding terms, "record" and "document." Those terms share a common meaning in everyday usage having to do with preserving information. It follows from the application of the canons *noscitur a sociis* and *ejusdem generis* that "tangible object" shares this common meaning. Aligned with the terms "record" and "document," "tangible object" is thus naturally read as meaning a thing used to preserve information, such as a computer, server, or similar storage device. This is also the most natural grammatical reading of "tangible object" when the

phrase is read in conjunction with the immediately preceding series of parallel transitive verbs, most notably, "makes a false entry in."

Moreover, this common-sense and contextual interpretation of "tangible object" is bolstered by its placement in the larger context of the Sarbanes-Oxley Act, and by Congress's tacit approval of the United States Sentencing Commission's construction of the phrase "records, documents, or tangible objects," as meaning those things that preserve or store information. Further, the contextual interpretation of "tangible object" avoids absurd results and constitutional concerns that follow from a non-contextual construction. Finally, if after examining "tangible object" in the context of the statute and the statutory scheme any lingering doubt remains, this criminal statute's meaning must be resolved in Mr. Yates's favor.

ARGUMENT

THE ORDINARY OR NATURAL MEANING OF "TANGIBLE OBJECT," IN THE CONTEXT OF 18 U.S.C. § 1519, IS A THING USED TO PRESERVE INFORMATION, SUCH AS A COMPUTER, SERVER, OR SIMILAR STORAGE DEVICE.

A federally-deputized Florida Fish and Wildlife Conservation Commission officer issued John Yates a civil citation for catching undersized red grouper in federal waters. Despite being told to bring the undersized fish to dock to be destroyed, Mr. Yates directed crewmen to throw them overboard at sea. This conduct resulted in Mr. Yates's conviction under the anti-shredding provision of the Sarbanes-Oxley Act of 2002, which criminalizes the destruction, alteration, or falsification of "any record, document, or tangible object." Pub. L. 107-2014, Title VIII, § 802, 116 Stat. 745, 18 U.S.C. § 1519 (2002). Viewed in isolation and out of context, the phrase "tangible object" is elastic enough to encompass a fish. That construction, however, contravenes this Court's precedents and principles of statutory interpretation.

Interpreting an undefined phrase in a statute begins with ascertaining the phrase's ordinary or natural meaning in common usage and consistent with the statutory scheme. Context is the cornerstone in this analysis. "Tangible object" means different things in different contexts. The meaning of that phrase, therefore, is necessarily informed by the surrounding statutory terms, the statute as a whole, and the phrase's placement in the statutory scheme.

Aligned with the terms "record" and "document" in the anti-shredding provision of the Sarbanes-Oxley Act, "tangible object" naturally means a thing used to preserve information, akin to a computer, server, or similar storage device. This Court's principles of statutory construction support this contextual meaning. Mr. Yates therefore asks the Court to reverse the decision of the court of appeals.

A. The ordinary or natural meaning of "tangible object" is based on its context.

The inquiry into what Congress meant by "tangible object" in the anti-shredding provision of the Sarbanes-Oxley Act starts by giving the statutory phrase its ordinary or natural meaning in everyday usage. *See United States v. Ressam*, 553 U.S. 272, 274 (2008) (relying on the "most natural reading of the relevant statutory text"); *Watson v. United States*, 552 U.S. 74, 83 (2007) (applying the "ordinary meaning and the conventions of English"); *Lopez v. Gonzales*, 549 U.S. 47, 53 (2006) (looking to the "everyday" or "regular usage" to maintain coherency with the "commonsense conception" of the term); *Smith v. United States*, 508 U.S. 223, 228 (1993) (referencing "ordinary or natural meaning" and "everyday meaning").

McBoyle v. United States, 283 U.S. 25 (1931), illustrates this point. In *McBoyle*, this Court construed the term "vehicle" in the National Motor Vehicle Theft Act, which defined "motor vehicle" as including "an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled *vehicle* not designed for running on rails." *Id.* at 26 (emphasis added). An aircraft plainly falls

within the dictionary definition of "vehicle." *Id.* This Court, however, unanimously held that an aircraft was *not* a vehicle *for purposes of the Act*, because "in everyday speech 'vehicle' calls up the picture of a thing moving on land." *Id.* The Court cautioned that statutory terms, like "vehicle," should not be extended beyond the meaning they "evoke in the common mind." *Id.* at 27.[5]

The dictionary, while often a helpful tool in resolving questions of the ordinary or natural meaning, is particularly unhelpful here because it defines the words "tangible" and "object" so generally that the phrase "tangible object" is chameleon-like. It adapts to whatever context it is used in. *See, e.g.*, *Federal Aviation Administration v. Cooper*, 132 S. Ct. 1441, 1150 (2012) ("Because the term 'actual damages' has this chameleon-like quality, we cannot rely on any all-purpose definition but must consider the particular context in which the term appears.").

Consider first the noun "object." It is essentially just "a discrete visible or tangible thing." *Webster's Third New International Unabridged Dictionary* 1555 (2002) (*Webster's Third*).[6] The adjective "tangible"

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[5] "[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [this Court's] precedents and that it expects its enactments to be interpreted in conformity with them." *North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995) (internal citations, alterations, and quotation marks omitted).

[6] For additional definitions of "object," *see American Heritage Dictionary of English Language* 1211 (4th ed. 2000) ("Something perceptible by one or more of the senses, especially by vision or touch; a material thing"; "A focus of attention, feeling, thought, or action"; "The purpose, aim, or goal of a specific action or

does little to clarify the type of thing, given that "tangible" is defined as "capable of being touched" or "capable of being realized by the mind[.]" *Webster's Third* 2337.[7]

By dictionary definition alone, then, the phrase "tangible object" only has substance when used in context. For example, if a person says, "General Motors sells tangible objects," one would naturally understand the person to be referring to automobiles, automobile parts, and the like. But if a person says,

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effort"); *Black's Law Dictionary* 1101 (7th ed. 1999) ("A person or thing to which thought, feeling, or action is directed"; "Something sought to be attained or accomplished"); *Ninth New Collegiate Dictionary* 814 (1998) ("something material that may be perceived by the senses"; "something mental or physical to which thought, feeling, or action is directed"; "the goal or end of effort or activity"); 10 *Oxford English Dictionary* 640 (2d ed. 1986) ("Something placed before the eyes, or presented to the sight or other sense; an individual thing seen or perceived, or that may be seen or perceived; a material thing"); *Random House Webster's Unabridged Dictionary* 1335 (2001) ("anything that is visible or tangible and is relatively stable in form"; "a thing, person, or matter to which thought or action is directed").

[7] For additional definitions of "tangible," *see American Heritage* 1767 ("Discernible by touch"; "Possible to be treated as fact; real or concrete"; "Possible to understand or realize"); *Black's* 1468 ("Having or possessing physical form"; "Capable of being touched and seen; perceptible to the touch; capable of being possessed or realized"; "Capable of being understood by the mind"); *Ninth New Collegiate* 1205 ("capable of being perceived esp. by the sense of touch"; "substantially real"; "capable of being precisely identified or realized by the mind"; "capable of being appraised at an actual or approximate value"); 17 *OED* 610 ("Capable of being touched"; "Material, externally real, objective"); *Random House* 1941 ("capable of being touched; material or substantial"; "real or actual, rather than imaginary or visionary").

"Apple sells tangible objects," one would not think of automobiles; rather, one would ordinarily understand the person to be referring to MacBooks, iMacs, iPhones, iPads, and other similar electronic "i" products. *See also* Paul Larkin, *Oversized Frauds, Undersized Fish, and Deconstruction of the Sarbanes-Oxley Act*, 103 Geo. L.J. 17, 18 (2014) (observing that "tangible object" draws its meaning from context similar to the term "soccer," which is considered "football" for purposes of the World Cup, but not for purposes of the Super Bowl).

As these examples illustrate, the phrase "tangible object" is so elastic that it stretches to the contours of whatever setting it is used in and conveys different meanings in different contexts. The ordinary or natural meaning of the phrase thus necessarily depends on reading it in the context in which it is used and identifying the category of things to which it refers. *See, e.g.*, *Caraco Pharmaceutical Labs, Ltd. v. Nordisk A/S*, 132 S. Ct. 1670, 1681 (2012) (explaining that the meaning of the phrase "not an" depends on how it is used, and therefore its meaning "turns on its context"); *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) ("Particularly when interpreting a statute that features as elastic a word as 'use,' the Court construes language in its context and in light of the terms surrounding it."); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) ("[T]he meaning of statutory language, plain or not, depends on context.").

For instance, in *Johnson v. United States*, 559 U.S. 133 (2010), this Court construed the phrase "physical force" in the definition of "violent felony" in the Armed Career Criminal Act, 18 U.S.C. § 924(e). Observing that "force has a number of meanings[,]"

the Court stressed that "context determines meaning[.]" 559 U.S. at 138-39. And while in the context of the common law offense of battery, "force" could mean "even the slightest offensive touching," in "the context of a statutory definition of '*violent* felony,' the phrase 'physical force' means *violent* force – that is, capable of causing physical pain or injury to another person." *Id.* at 140.

As with the meaning of "force" in *Johnson*, the meaning of "tangible object" must derive from "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Nken v. Holder*, 556 U.S. 418, 426 (2009) (internal quotation marks and citation omitted); *see also Dolan v. Postal Service*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.").

B. In the specific context of its surrounding terms, "tangible object" means a thing used to preserve information, like a computer, server, or similar storage device.

Two contextual canons, *noscitur a sociis* and *ejusdem generis*, are of particular assistance in determining the meaning of "tangible object" in the context of its surrounding words.[8] The canon *noscitur a sociis* instructs that "words grouped in a list should be given related meaning." *Dole v. United Steelworkers of America*, 494 U.S. 26, 36 (1990). Similarly, the canon *ejusdem generis* dictates that where general or vague words follow specific words in a statute, the "general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Washington State Dep't of Social & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001)).[9]

For instance, when addressing the meaning of "discovery" in the Excess Profits Tax Act, this Court noted that the statutory term – much like "tangible object" here – "is a word usable in many contexts and with various shades of meaning." *Jarecki v. G. D.*

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[8] "It is presumable that Congress legislates with knowledge of [this Court's] basic rules of statutory construction." *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991).

[9] *See also F.W. Fitch Co. v. United States*, 323 U.S. 582, 585-86 (1945) (holding that in light of the *ejusdem generis* doctrine, "other charge" in the phrase "transportation, delivery, insurance, or other charge" included only shipment costs, not pre-shipment costs).

Searle & Co., 367 U.S. 303, 307 (1961). The Court thus looked to the words around it, observing that "discovery" was used in conjunction with "exploration" and "prospecting" in the statute. *Id.* Reasoning that the three words had a common meaning in that "all describe income-producing activity in the oil and gas and mining industries[,]" the Court concluded that "discovery" in that statute "means only the discovery of mineral resources." *Id.* *See also Paroline v. United States*, 134 S. Ct. 1710, 1721 (2014) ("It is . . . a familiar canon of statutory construction that [catchall] clauses are to be read as bringing within a statute categories similar in type to those specifically enumerated.") (quoting *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973)).

Here, the nouns immediately preceding "or tangible object" in § 1519 are "record" and "document." A "record" is commonly defined as a permanent account of events that preserves information. *See, e.g.*, *Webster's Third* 1898 ("an account in writing or print (as in a document) or in some other permanent form (as on a monument) intended to perpetuate a knowledge of acts or events").[10] Likewise, the

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[10] For additional definitions of "record," *see American Heritage* 1461 ("An account, as of information or facts, set down especially in writing as a means of preserving knowledge"); *Black's* 1279 ("A documentary account of past events, usu. designed to memorialize those events; information that is inscribed on a tangible medium or that, having been stored in an electronic or other medium, is retrievable in perceivable form"); *Ninth New Collegiate* 984 ("something that recalls or relates past events"; "an official document that records the acts of a public body or officer"); 13 *OED* 359 ("The fact or attribute of being, or having been, committed to writing as authentic evidence of a matter having legal importance"); *Random House* 1612 ("an account in

common meaning of "document" is a writing that preserves certain information. *See, e.g.*, *Webster's Third* 666 ("an original or official paper relied upon as the basis, proof, or support of something").[11]

"Record" and "document" thus share a common meaning in everyday usage having to do with preserving information. *See Jarecki*, 367 U.S. at 307. It follows from the application of the canons *noscitur a sociis* and *ejusdem generis* that "tangible object" shares that common meaning as well. Within the context of the anti-shredding provision, then, "tangible object" is naturally understood to be a thing that is used to preserve information, such as a computer, server, or similar storage device.

This is also the natural reading of the nouns when read in conjunction with the immediately preceding series of parallel transitive verbs: "alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in." 18 U.S.C. § 1519.

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writing or the like preserving the memory or knowledge of facts or events").

[11] For additional definitions of "document," *see American Heritage* 530 ("A written or printed paper that bears the original, official, or legal form of something and can be used to furnish evidence or information"); *Black's* 498 ("Something tangible on which words, symbols, or marks are recorded"); *Ninth New Collegiate* 371 ("an original or official paper relied on as the basis, proof, or support of something"; "a writing conveying information"); 4 *OED* 916 ("That which serves to show, point out, or prove something; evidence, proof"); *Random House* 578 ("a written or printed paper furnishing information or evidence").

Of particular significance, Congress placed the verb phrase "makes a false entry in" immediately before "any record, document, or tangible object." *Id.* The use of the preposition "in" means that "tangible object," as used in the anti-shredding provision, must be a thing "in" which a false entry can be made. *See, e.g., Lopez*, 549 U.S. at 56 ("[O]ur interpretive regime reads whole sections of a statute together to fix on the meaning of any one of them, and the last thing this approach would do is divorce a noun from the modifier next to it without some extraordinary reason."). A false entry can be made in a document, record, or other thing that is used to preserve information, such as a computer, server, or similar storage device. But a false entry cannot be made in every thing. More specifically, a false entry cannot be made in a fish.

C. The broader statutory context in which "tangible object" is placed confirms the phrase's meaning as a thing used to preserve information, akin to a computer, server, or similar storage device.

In addition to the immediately surrounding words, a contextual analysis requires examination of the placement of the phrase "tangible object" in the larger statutory scheme.[12] "Tangible object" is found in

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[12] *See generally Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (holding that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme") (internal quotation marks omitted); *Bailey v. United States*, 516 U.S. 137, 145 (1995) ("We consider not only the bare meaning" of the critical word or phrase "but also its placement and purpose in the statutory scheme.").

§ 1519, which was enacted as part of the Sarbanes-Oxley Act. Congress passed that Act in response to the systematic campaign by Enron and its auditor, Arthur Anderson, to purge records and documents in anticipation of a federal investigation. *See generally Lawson*, 134 S. Ct. at 1161. The purge extended beyond paper records and documents to computer drives and the email system. *See Arthur Anderson LLP*, 2002 WL 32153945, at ¶¶ 5, 9-11.

The Sarbanes-Oxley Act was enacted, "To safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation," and to "prevent and punish corporate and criminal fraud, protect the victims of such fraud, preserve evidence of such fraud, and hold wrongdoers accountable for their actions." *Lawson*, 134 S. Ct. at 1161-62 (quoting S. Rep. No. 107-146, p. 2 (2002)).

The anti-shredding provision was placed in § 802 of Title VIII of the Sarbanes-Oxley Act. The titles of these provisions are informative. *See Immigration and Naturalization Service v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183, 189-90 (1991).

Title VIII, titled, "Corporate and Criminal Fraud Accountability Act of 2002," contains two new criminal offenses in § 802, which is titled "Criminal Penalties for Altering *Documents*." Pub. L. 107-2014, Title VIII, § 802, 116 Stat. 745 (emphasis added). The first is 18 U.S.C. § 1519, titled, "Destruction, alteration, or falsification of *records* in Federal investigations and bankruptcy." 18 U.S.C. § 1519 (emphasis added).

Section 1519's companion provision in § 802 of Title VIII is 18 U.S.C. § 1520, titled, "Destruction of corporate audit *records*." *See* 18 U.S.C. § 1520 (2002) (emphasis added). That provision directs the Securities and Exchange Commission to promulgate rules for the retention of documents and records (including electronic records). It also penalizes accountants for willfully failing to preserve "workpapers" of audits conducted for issuers of regulated securities. *Id.*[13]

Given the placement of "tangible object" in this statutory scheme, which is so obviously intended to preserve corporate records, documents, computer drives, and email servers, an ordinary person would naturally read "tangible object" to mean a thing used to preserve information, like a computer, server, or similar storage device.

Further insight into the meaning and purpose of "tangible object" can be found in § 805 of the Act, which directed the United States Sentencing Commission to amend the United States Sentencing Guidelines relating to § 1519 and § 1520. *See* Pub. L. 107-2014, Title VIII, § 805, 116 Stat. 745. In response to that directive, the Sentencing Commission enhanced the guideline penalties for

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[13] The provisions immediately preceding the anti-shredding provision apply to obstruction in specific cases, such as in federal audits, examination of financial institutions, and criminal investigations of health care offenses. *See* 18 U.S.C. §§ 1516-1518 (2000). Thus, it makes sense that § 1519 also would apply to a specific category of obstruction offenses – those involving the destruction of things that preserve information, like the things involved in the Enron scandal that prompted the passage of the Act.

obstruction of justice offenses involving "the destruction, alteration, or fabrication of a substantial number of *records, documents, or tangible objects*[.]" U.S. Sentencing Guidelines Manual, app. C, amend. 647 (2003) (emphasis added); *see also* U.S. Sentencing Guidelines Manual § 2J1.2(b)(3) (2003). The Commission then provided the following commentary:

> "Records, documents, or tangible objects" includes (A) records, documents, or tangible objects that are stored on, or that are, magnetic, optical, digital, other electronic, or other storage mediums or devices; and (B) wire or electronic communications.

U.S. Sentencing Guidelines Manual, app. C, amend. 653 (2003); *see also* U.S. Sentencing Guidelines Manual § 2J1.2 cmt. n.1 (2003).

The Sentencing Commission clearly borrowed the language "records, documents, or tangible objects" from the anti-shredding provision, as no other provision in the Sarbanes-Oxley Act uses that exact language. If the Commission's construction of "records, documents, or tangible objects" did not comport with Congress's intentions, certainly Congress would have voiced its opposition. *See* 28 U.S.C. § 994(p). Congress's tacit approval of the Sentencing Commission's construction indicates that construction effectuates Congress's intended meaning of "tangible object." *See id.* That meaning is a thing that is used to preserve information, similar to a computer, server, or similar storage device.

D. Interpreting "tangible object" to mean a thing used to preserve information, such as a computer, server, or similar storage device, avoids absurd results.

Reading the phrase "tangible object" in context and consistently with the legislative purpose will avoid absurd, odd, and unreasonable results. *See Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940) ("A literal reading of [statutes] which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose."); *see also Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 200 & n.3 (1993) (citing cases dating back to 1869 applying "the common mandate of statutory construction to avoid absurd results").

A broad reading of "tangible object," in contrast, would produce unreasonable results. Consider, for example, an automobile manufacturer that voluntarily recalls defective automobile parts and decides to scrap ("destroy") its inventory of recalled defective parts ("tangible objects"). That manufacturer could be prosecuted under the anti-shredding provision if the automaker's intent in taking this remedial measure was to avoid ("influence") the levy of a fine by the National Highway Traffic and Safety Administration. The automaker would thus be forced to retain and store all of those defective auto parts to comply with this law.

This case also illustrates the absurdity that results when "tangible object" is construed outside of its context. For the act of directing that fish be thrown overboard to obstruct a civil investigation, Mr. Yates

was convicted of violating § 1519, which subjected him to up to 20 years in prison. There were certainly other statutes covering Mr. Yates's acts. Indeed, he was also charged with and convicted of the "destruction or removal of property to prevent seizure," which is punishable by up to five years' imprisonment. *See* 18 U.S.C. § 2232(a).[14] Moreover, the vast majority of obstruction-of-justice statutes are punishable by no more than five years in prison.[15]

It makes little sense then to conclude that the anti-shredding provision makes it a 20-year felony to destroy any thing, including a fish, with intent to influence the administration of any federal matter. And it makes even less sense to conclude that Congress intended to convert every attempt to evade a federal civil sanction into a 20-year felony. Certainly Congress did not intend such unreasonable results when it enacted the anti-shredding provision.

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[14] Additionally, Mr. Yates was charged with, but acquitted of, making a false statement to federal agents, in violation of 18 U.S.C. § 1001(a)(2). *See* JA 7-8, 119.

[15] *See, e.g.*, 18 U.S.C. § 245(b) (2006) (obstruction of civil rights); 18 U.S.C. § 505 (2006) (court forgeries); 18 U.S.C. § 1505 (2006) (obstruction before departments, agencies, and committees, unless terrorism is involved, in which case the penalty rises to eight years); 18 U.S.C. §1510 (2006) (obstruction of criminal investigations).

E. A contextual construction of "tangible object" as a thing used to preserve information, like a computer, server or similar storage device, comports with the rules of constitutional avoidance and lenity.

Two additional rules of statutory construction further militate in favor of construing "tangible object" in the context of the anti-shredding provision to mean a thing used to preserve information – the rules of constitutional avoidance and lenity. Concerning the former, "it is 'a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.'" *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014) (quoting *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984)).[16]

For example, in *Skilling v. United States*, 561 U.S. 358 (2010), this Court held that the honest-services statute "presents no vagueness problem" when narrowly construed to apply only to "fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party." *Id.* at 404; *see also id.* at 402-13. The Court explained that the statute, so construed, does not raise either of the concerns that the void-for-

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[16] *See also Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (noting the well-settled rule that when "an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'") (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

vagueness doctrine addresses, namely, providing "fair notice" and preventing "arbitrary and discriminatory prosecutions." *Id.* at 412.

The lower court's non-contextual expansion of the anti-shredding provision's phrase "tangible object," on the other hand, raises serious constitutional questions. For example, an offense defined by terms that are so indefinite that law is made concerning their meaning on a case-by-case basis is void for vagueness. *See Ashton v. Kentucky*, 384 U.S. 195, 198-99 (1966) ("[S]ince the law must be made on a case to case basis, the elements of the crime are so indefinite and uncertain that it . . . leav[es] to the executive and judicial branches too wide a discretion in its application.") (internal quotation marks and citations omitted). "Tangible object" is such a term if given a broad, non-contextual construction.

Moreover, given the anti-shredding provision's de minimus connection to any federal matter,[17] a broad reading of "tangible object" may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)). This is tantamount to executive legislating, which is offensive to the Constitution's separation of powers. Thus, to insist on the broadest

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[17] The only connection that the conduct prohibited by § 1519 must have to a federal matter is that the conduct must be done "*with the intent* to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case." 18 U.S.C. § 1519 (emphasis added).

interpretation of "tangible object" is to add to the phrase's vagueness and exacerbate constitutional concerns.

This Court can avoid these constitutional concerns by interpreting "tangible object" narrowly and within its context to mean a thing that is used to preserve information, akin to a computer, server, or similar storage device. As this Court has previously observed, "We have traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress, and out of concern that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *Arthur Andersen LLP*, 554 U.S. at 703 (internal citations and quotation marks omitted). Similar restraint is appropriate here.

Finally, if any doubt remains as to the meaning of "tangible object," the rule of lenity requires that the doubt be resolved in Mr. Yates's favor. *See McNally v. United States*, 483 U.S. 350, 359-60 (1987) (observing that the rule of lenity requires that "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language"); *cf. United States v. Bass*, 404 U.S. 336, 347-349 (1971) (applying rule of lenity in defendant's favor where Congress had "not 'plainly and unmistakably,' . . . made it a federal criminal crime for a convicted felon simply to possess a gun absent some demonstrated nexus with interstate commerce") (quoting *United States v. Gradwell*, 243 U.S. 476, 485 (1917)). Mr. Yates's contextual reading of "tangible object" as meaning things used to preserve

information, akin to a computer, server, or similar storage device, is at least as valid as the Eleventh Circuit's non-contextual interpretation. Accordingly, the rule of lenity dictates that the breadth of "tangible object" in the anti-shredding provision be limited to things used to preserve information.

CONCLUSION

For all the foregoing reasons, the judgment of the United States Court of Appeals for the Eleventh Circuit should be reversed, and the case should be remanded with instructions that Mr. Yates's conviction under 18 U.S.C. § 1519 be vacated.

Respectfully submitted,

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RESPONDENT'S BRIEF

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In the Supreme Court of the United States

JOHN L. YATES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Section 1519 of Title 18 of the United States Code prohibits the destruction, concealment, or covering up of "any record, document, or tangible object" with the intent to impede or obstruct an investigation or proceeding under the jurisdiction of the federal government. 18 U.S.C. 1519.

The question presented is whether Section 1519's reference to "any * * * tangible object" encompasses ordinary physical evidence—such as undersized red grouper caught in violation of United States fisheries laws—or is limited to "thing[s] used to preserve information, such as a computer, server, or similar storage device." Pet. Br. i, 8.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 1
Statement 2
A. The legal background 2
B. The present controversy 6
Summary of argument 10
Argument:
I. Section 1519 prohibits the destruction of all tangible objects 14
A. Section 1519 unambiguously covers all physical evidence 14
1. The plain meaning of "any * * * tangible object" covers all physical items 14
2. The structure and purpose of Chapter 73 and Section 1519 reinforce the plain meaning 17
B. Congress modeled Section 1519 on similar provisions long understood to cover all physical evidence 19
1. Section 1519 borrowed language from the Model Penal Code and subsequent reform proposals 19
2. Section 1519 is modeled on Section 1512 25
C. The legislative history further confirms that Section 1519 covers all physical evidence 29
II. Petitioner's narrow construction of Section 1519 lacks merit 35
A. Neither text nor context supports limiting "any * * * tangible object" to information-storage devices 35
1. Dictionary definitions convey the ordinary, commonsense meaning of "tangible object" 35
2. *Noscitur a sociis* and *ejusdem generis* do not support petitioner 37

Table of contents—Continued: Page

3. The title and section headings do not limit Section 1519's ordinary meaning 40
4. The prohibition on "mak[ing] a false entry in" evidence does not restrict the scope of "any * * * tangible object" 41
5. The Sentencing Commission's definition of "tangible object" does not support petitioner 43
B. Section 1519's origins in the Sarbanes-Oxley Act do not trump its plain meaning 46
C. Petitioner's construction of Section 1519 is not compelled by other principles of interpretation 50
1. Prohibiting the destruction of physical evidence is not absurd 50
2. The constitutional avoidance canon does not support petitioner 53
3. Amici's policy objections to Section 1519 are unfounded 54
4. The rule of lenity has no application here 55
Conclusion 56
Appendix — Statutory provisions 1a

TABLE OF AUTHORITIES

Cases:

Ali v. *Federal Bureau of Prisons*, 552 U.S. 214 (2008) 15, 38, 39, 40
Brotherhood of R.R. Trainmen v. *Baltimore & Ohio R.R.*, 331 U.S. 519 (1947) 40
Burrage v. *United States*, 134 S. Ct. 881 (2014) 15
Caraco Pharm. Labs, Ltd. v. *Nordisk A/S*, 132 S. Ct. 1670 (2012) 36
Christopher v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012) 38, 39
Clark v. *Martinez*, 543 U.S. 371 (2005) 53

Cases—Continued: Page

Commonwealth v. *Delgado*, 679 A.2d 223 (Pa. 1996) 22
DePierre v. *United States*, 131 S. Ct. 2225 (2011) 44, 47
Erlenbaugh v. *United States*, 409 U.S. 239 (1972) 29
Federal Aviation Admin. v. *Cooper*, 132 S. Ct. 1441 (2012) 36
Garcia v. *United States*, 469 U.S. 70 (1984) 37
Graham Cnty. Soil & Water Conservation Dist. v. *Wilson*, 559 U.S. 280 (2010) 39
Harrison v. *PPG Indus., Inc.*, 446 U.S. 578 (1980) 16
Hickman v. *Taylor*, 329 U.S. 495 (1947) 17
Holder v. *Humanitarian Law Project*, 561 U.S. 1 (2010) 54
Jarecki v. *G. D. Searle*, 367 U.S. 303 (1961) 36, 38
Lawson v. *FMR LLC*, 134 S. Ct. 1158 (2014) 15, 41
Liparota v. *United States*, 471 U.S. 419 (1985) 55
Lorillard v. *Pons*, 434 U.S. 575 (1978) 28
Maracich v. *Spears*, 133 S. Ct. 2191 (2013) 55
McBoyle v. *United States*, 283 U.S. 25 (1931) 36
Mullins v. *State*, 717 N.E.2d 902 (Ind. Ct. App. 1999) 22
National Ass'n of Home Builders v. *Defenders of Wildlife*, 551 U.S. 644 (2007) 17
Octane Fitness, LLC v. *ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014) 14, 15
Oncale v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) 47
Pettibone v. *United States*, 148 U.S. 197 (1893) 3
Raney v. *State*, 982 S.W.2d 429 (Tex. Crim. App. 1998) 22
Robers v. *United States*, 134 S. Ct. 1854 (2014) 42

Cases—Continued: Page

Rowe v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364 (2008) 28
Sandifer v. *United States Steel Corp.*, 134 S. Ct. 870 (2014) 14
Sebelius v. *Cloer*, 133 S. Ct. 1886 (2013) 15, 18
Sekhar v. *United States*, 133 S. Ct. 2720 (2013) 19
Smith v. *State*, 288 P. 367 (Okla. Crim. App.1930) 22
Smith v. *United States*, 508 U.S. 223 (1993) 10
Sorenson v. *Secretary of Treasury*, 475 U.S. 851 (1986) 29
State v. *Adkisson*, No. M2000-01079-CCA-R3CD, 2001 WL 1218570 (Tenn. Crim. App. Oct. 12, 2001) 22
State v. *Ford*, 906 S.W.2d 761 (Mo. Ct. App. 1995) 22
State v. *Gonzales*, 2 P.3d 954 (Utah Ct. App. 2000) 22
State v. *Haase*, 702 A.2d 1187 (Conn. 1997), cert. denied, 523 U.S. 1111 (1998) 22
State v. *Hawkins*, 406 S.W.3d 121 (Tenn. 2013) 22
State v. *Jennings*, 666 So. 2d 131 (Fla. 1995) 22
State v. *Lytle*, 551 N.E.2d 950 (Ohio 1990) 22
State v. *Nalder*, 37 P.3d 661 (Mont. 2001) 22
Timberlake v. *United States*, 758 A.2d 978 (D.C. 2000) 22
United States v. *Aguilar*, 515 U.S. 593 (1995) 3, 31
United States v. *Alpers*, 338 U.S. 680 (1950) 39
United States v. *Applewhaite*, 195 F.3d 679 (3d Cir. 1999) 28
United States v. *Atlantic States Cast Iron Pipe Co.*, 612 F. Supp. 2d 453 (D. N.J. 2009) 5
United States v. *Batchelder*, 442 U.S. 114 (1979) 53
United States v. *Castleman*, 134 S. Ct. 1405 (2014) 53

Cases—Continued: Page

United States v. *Diana Shipping Servs., S.A.*, 985 F. Supp. 2d 719 (E.D. Va. 2013) 5
United States v. *England*, 555 F.3d 616 (7th Cir. 2009) 28
United States v. *Frankhauser*, 80 F.3d 641 (1st Cir. 1996) 28, 31, 34
United States v. *Gonzales*, 520 U.S. 1 (1997) 15
United States v. *Green*, No. 5:06CR-19-R, 2008 WL 4000870 (W.D. Ky. Aug. 26, 2008) 5
United States v. *Johnson*, 655 F.3d 594 (7th Cir. 2011) 5, 27, 28
United States v. *Kellington*, 217 F.3d 1084 (9th Cir. 2000) 28
United States v. *Lanier*, 520 U.S. 259 (1997) 54
United States v. *MacFarlane*, No. 96-30296, 1998 WL 75694 (9th Cir. Feb. 23, 1998) 28
United States v. *Matthews*, 505 F.3d 698 (7th Cir. 2007) 5
United States v. *McRae*, 702 F.3d 806 (5th Cir. 2012), cert. denied, 133 S. Ct. 2037 (2013) 5
United States v. *Moyer*:
674 F.3d 192 (3d Cir.), cert. denied, 133 S. Ct. 165 (2012), and 133 S. Ct. 979 (2013) 54
726 F. Supp. 2d 498 (M.D. Pa. 2010) 5
United States v. *Ortiz*, 220 Fed. Appx. 13 (2d Cir. 2007) 5
United States v. *Perez*, 603 F.3d 44 (D.C. Cir. 2010) 5
United States v. *Stevens*, 559 U.S. 460 (2010) 37, 38
United States v. *Thompson*, 237 Fed. Appx. 575 (11th Cir. 2007), cert. denied, 552 U.S. 1121 (2008) 5
United States v. *Thompson/Center Arms Co.*, 504 U.S. 505 (1992) 40

Cases—Continued: Page

United States v. *Turkette*, 452 U.S. 576 (1981).....37, 38
United States v. *Yielding*, 657 F.3d 688 (8th Cir. 2011), cert. denied, 132 S. Ct. 1777 (2012).....54
Village of Hoffman Estates v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982).....53, 54
Wachovia Bank, NA v. *Schmidt*, 546 U.S. 303 (2006).....26

Constitution, statutes, regulation, guidelines and rules:

U.S. Const. Amend. V (Due Process Clause).....53
Antitrust Civil Process Act, 15 U.S.C. 1311 *et seq.*.....42
Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383:
§ 102, 90 Stat. 1384.....42
§ 105, 90 Stat. 1389.....42
Magnuson-Stevens Fishery Conservation and Management Act, Pub. L. No. 94-265, 90 Stat. 331.....7
Sarbanes-Oxley Act of 2002, Pub. L. No. 107-24, 116 Stat. 745.....2
Tit. VII, 116 Stat. 800.....2
§ 802, 116 Stat. 800.....40, 41
§ 805(a), 116 Stat. 802.....45
§ 805(a)(2)(A)(i), 116 Stat. 802.....45
18 U.S.C. 1519.....*passim*, 22a
Tit. XI, 116 Stat. 807.....11
§ 1102, 116 Stat. 807.....11
§ 1104(b), 116 Stat. 809.....45
§ 1104(b)(4), 116 Stat. 809.....45
Legis. History n., 116 Stat. 810.....30
18 U.S.C. 1512(c).....5, 49, 15a
18 U.S.C. 1512(c)(1).....*passim*, 15a

Statutes, regulation, guidelines and rules—Continued:

Page

21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 3001, 116 Stat. 1803 27
18 U.S.C. 1512(a)(2) (2000 & Supp. II 2002) 27, 7a
18 U.S.C. 1512(a)(2)(B)(i) 50, 13a
18 U.S.C. 1512(a)(2)(B)(iii) 50, 13a
Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 4, 96 Stat. 1249 ..... 25, 34
2 U.S.C. 386 16
2 U.S.C. 388 16
7 U.S.C. 7702 16
7 U.S.C. 7733 16
7 U.S.C. 8302 16
7 U.S.C. 8314 16
15 U.S.C. 57b-1 16
15 U.S.C. 57b-2 16
15 U.S.C. 77v 16
15 U.S.C. 77z-1 16
15 U.S.C. 78u-4 16
15 U.S.C. 78aa 16
15 U.S.C. 80a-43 16
15 U.S.C. 80b-14 16
17 U.S.C. 803 16
18 U.S.C. 668 16
18 U.S.C. 1001(a)(2) 8
18 U.S.C. 1501 *et seq.* (Ch. 73) ..... *passim*
18 U.S.C. 1503 (1970) 25
18 U.S.C. 1503 (1976) 24
18 U.S.C. 1503 ..... 3, 19, 20, 23, 24, 30, 1a

Statutes, regulation, guidelines and rules—Continued:

Page

18 U.S.C. 1505 ..... 42, 43, 2a
18 U.S.C. 1512 (2000) 27, 33, 3a
18 U.S.C. 1512 (2000 & Supp. II 2002) 7a
18 U.S.C. 1512 ..... *passim*, 12a
18 U.S.C. 1512(a) (2000) 11, 3a
18 U.S.C. 1512(a)(1)(B) (2000) 4, 26, 3a
18 U.S.C. 1512(a)(1)(B) 27, 50, 12a
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Page

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comment. (n.1) 43, 45
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App. C:
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Amend. 653 ..... 44, 45
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Rule 5 16
Rule 26 16
Rule 26(b) 16, 28
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Rule—Continued: Page

Rule 41 16

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In the Supreme Court of the United States

No. 13-7451

JOHN L. YATES, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (J.A. 124-134) is reported at 733 F.3d 1059. The opinion of the district court (J.A. 115-117) is not published in the Federal Supplement but is available at 2011 WL 3444093.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 2013. The petition for a writ of certiorari was filed on November 13, 2013 and granted on April 28, 2014. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the Appendix to this brief. App., *infra*, 1a-43a.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on two counts relating to his destruction of undersized fish for the purpose of interfering with a federal proceeding under the jurisdiction of the National Marine Fisheries Service. Count 1 charged him with preventing federal officials from exercising their lawful authority to seize the fish, in violation of 18 U.S.C. 2232(a). Count 2 charged him with destroying or concealing the fish in order to impede the Fisheries Service's investigation and administration of the federal fisheries laws, in violation of 18 U.S.C. 1519. Petitioner was sentenced to 30 days' imprisonment, to be followed by 36 months' supervised release. The court of appeals affirmed.

A. The Legal Background

1. This case concerns the proper interpretation of 18 U.S.C. 1519, one of the "Obstruction of Justice" provisions in Chapter 73 of Title 18 of the United States Code, 18 U.S.C. 1501 *et seq.* Section 1519 was enacted in 2002, as part of the Corporate and Criminal Fraud Accountability Act of 2002, Pub. L. No. 107-204, Tit. VIII, 116 Stat. 800, which is part of the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act), Pub. L. No. 107-204, 116 Stat. 745. Section 1519 imposes criminal liability on

> [w]hoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in *any record, document, or tangible object* with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency

> of the United States or any [bankruptcy] case filed under title 11, or in relation to or contemplation of any such matter or case.

18 U.S.C. 1519 (emphasis added) (authorizing a fine and up to 20 years' imprisonment).

2. Until Section 1519 became law in 2002, Chapter 73 did not expressly prohibit destroying evidence to obstruct justice. The government traditionally prosecuted such evidence destruction under the "Omnibus Clause" of 18 U.S.C. 1503, a catchall provision generally barring any person from endeavoring to influence, obstruct, or impede the "due administration of justice." See Jamie S. Gorelick et al., *Destruction of Evidence* §§ 1.4, 5.3, at 8-9, 172-185 (1989) (Gorelick). The Omnibus Clause addresses only the obstruction of pending judicial proceedings. *United States* v. *Aguilar*, 515 U.S. 593, 599 (1995) (discussing *Pettibone* v. *United States*, 148 U.S. 197, 206-207 (1893)).

For decades, legal reformers urged the enactment of a general evidence-destruction provision along the lines of what eventually became Section 1519. In 1962, the Model Penal Code issued by the American Law Institute (ALI) contained a provision—labeled "Tampering With or Fabricating Physical Evidence"—that imposed liability on any person who "alters, destroys, conceals or removes *any record, document or thing* with purpose to impair its verity or availability in [any official] proceeding or investigation." Model Penal Code § 241.7(1) (emphasis added). Virtually identical proposals were embraced by state legislatures, the National Commission on Reform of Federal Criminal Laws (Brown Commission), and various members of Congress. See pp. 20-24, *infra*. All of these proposals

were understood to cover the destruction of all types of physical evidence. *Ibid.*

In 1982, Congress enacted similar language as part of a new witness-tampering provision, 18 U.S.C. 1512. That provision prohibited various actions designed to make unavailable any "*record, document, or other object*" in an official proceeding, whether or not that proceeding was yet pending. 18 U.S.C. 1512(a)(1)(B), (b)(2)(A) and (C) (2000) (emphasis added); S. Rep. No. 532, 97th Cong., 2d Sess. 2, 3 (1982) (1982 Senate Report). The new Section 1512 also barred a person from "corruptly persuad[ing]" someone else to "alter, destroy, mutilate, or conceal *an object* with intent to impair the object's integrity or availability for use" in such a proceeding. 18 U.S.C. 1512(b)(2)(B) (2000) (emphasis added). But Section 1512 did not prohibit that person from directly destroying the evidence himself.

3. In the Sarbanes-Oxley Act, Congress enacted the broad prohibition on evidence destruction that reformers had urged for decades. The main impetus for the legislation was the exposure of massive fraud by the Enron Corporation and the widespread destruction of potentially incriminating documents by Enron's outside accounting firm, Arthur Andersen LLP. S. Rep. No. 146, 107th Cong., 2d Sess. 2-7 (2002) (2002 Senate Report). But Congress recognized that Section 1519's prohibition on destroying or tampering with "any record, document, or tangible object" would "apply broadly" and outlaw "*any* acts to destroy or fabricate physical evidence" for the purpose of impeding the investigation of "*any* matter" within the federal government's jurisdiction. *Id.* at 14 (emphasis added).

The Sarbanes-Oxley Act also added a second evidence-destruction prohibition—in addition to Section 1519—to the pre-existing witness-tampering provision. See 18 U.S.C. 1512(c). Section 1512(c)(1) authorizes up to 20 years' imprisonment for any person who corruptly "alters, destroys, mutilates, or conceals a *record, document, or other object* * * * with the intent to impair the object's integrity or availability for use in an official proceeding." 18 U.S.C. 1512(c)(1) (emphasis added).

4. Since 2002, Sections 1519 and 1512(c)(1) have served as important tools for deterring and punishing the obstruction of justice. The government has used these provisions to prosecute the destruction of a wide array of physical evidence—including human bodies, bloodstains, guns, drugs, cash, and automobiles—in order to cover up offenses ranging from terrorism and the unreasonable use of lethal police force to violations of environmental and workplace-safety laws.[1]

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[1] For examples of cases using Section 1519, see *United States* v. *McRae*, 702 F.3d 806, 834-835 & n.16 (5th Cir. 2012) (human corpse), cert. denied, 133 S. Ct. 2037 (2013); *United States* v. *Perez*, 603 F.3d 44, 45 (D.C. Cir. 2010) (cocaine); *United States* v. *Diana Shipping Servs., S.A.*, 985 F. Supp. 2d 719, 722-724, 732 (E.D. Va. 2013) (pipe used to bypass vessel's anti-pollution equipment and discharge bilge water at sea); *United States* v. *Atlantic States Cast Iron Pipe Co.*, 612 F. Supp. 2d 453, 512, 540 (D. N.J. 2009) (cement mixer with bypassed worker-safety device). For examples of cases using Section 1512(c)(1), see *United States* v. *Johnson*, 655 F.3d 594, 598, 603-605 (7th Cir. 2011) (cocaine); *United States* v. *Matthews*, 505 F.3d 698, 701 (7th Cir. 2007) (firearm); *United States* v. *Thompson*, 237 Fed. Appx. 575, 575-576 (11th Cir. 2007) (per curiam) (suitcase containing firearm, cash, and cocaine), cert. denied, 552 U.S. 1121 (2008); *United States* v. *Ortiz*, 220 Fed. Appx. 13, 16-17 (2d Cir. 2007) (car); *United States* v. *Moyer*, 726 F. Supp. 2d 498, 510-511 (M.D. Pa. 2010) (shoes); *United States* v.

Most recently, a jury convicted a man under Section 1519 for helping the Boston Marathon bombers conceal physical evidence—in the form of a backpack containing fireworks, a jar of Vaseline, and a thumb drive—with intent to obstruct the investigation of the attacks. *United States* v. *Tazhayakov*, 1:13-CR-10238-DPW Docket entry No. 334, at 2 (D. Mass. July 21, 2014).

B. The Present Controversy

1. Petitioner is a commercial fisherman who captained the *Miss Katie*, a vessel that harvested fish in the Gulf of Mexico. J.A. 125. On August 23, 2007, John Jones, a field officer with the Florida Fish and Wildlife Conservation Commission, was on patrol in the Gulf with two fellow officers. J.A. 12-13, 19-21, 125. Officer Jones was deputized as a federal agent by the National Marine Fisheries Service (NMFS), in which capacity he was charged with enforcing the federal fisheries laws. J.A. 13, 125.[2] Their patrol encountered the *Miss Katie* within the "exclusive economic zone" of the United States, approximately 100 miles offshore due west of Tampa. J.A. 21-24.

Noting that the *Miss Katie* was engaged in a commercial fish harvest, the officers boarded the vessel to inspect for compliance with applicable equipment, safety, and fishing rules. J.A. 22-23, 125. While on board, Officer Jones noticed several red grouper that appeared to be less than 20 inches long, in violation of

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Green, No. 5:06CR-19-R, 2008 WL 4000870, at *11 (W.D. Ky. Aug. 26, 2008) (human corpse).

[2] The NMFS is a division of the United States Department of Commerce's National Oceanic and Atmospheric Administration. It is charged with enforcing the federal fisheries laws. J.A. 61.

federal regulations implementing the Magnuson-Stevens Fishery Conservation and Management Act, Pub. L. No. 94-265, 90 Stat. 331. J.A. 14-15, 23-24; see 50 C.F.R. 622.37(d)(2)(ii) (2007).

Officer Jones measured petitioner's catch and determined that petitioner had illegally harvested 72 undersized red grouper. J.A. 26-34, 126. He checked each undersized fish twice to confirm its length, gave petitioner the benefit of the doubt on any fish measuring close to 20 inches, and had a fellow officer record the length of each undersized fish on a catch measurement verification form. J.A. 27, 31-34, 41, 82-84. Officer Jones signed the form and asked petitioner to do the same. J.A. 34, 36, 39. Petitioner refused. J.A. 39.

Officer Jones issued petitioner a citation and placed the undersized fish in wooden crates. J.A. 41-43, 81, 126. He put the crates inside a large cooler that also stored the *Miss Katie*'s legally harvested catch and provisions for its crew. J.A. 25-26, 41-42. He decided not to seal those crates with evidence tape, because doing so would have blocked the crew from accessing their food and drink. J.A. 43, 45. Officer Jones instructed petitioner to leave the fish inside the wooden crates and to bring the fish back to port the following day, at the conclusion of the *Miss Katie*'s trip. J.A. 44, 68, 126.

Petitioner did not follow Officer Jones's instructions. Instead, after the officers departed, petitioner told his crew that "he [petitioner] wasn't stupid, [and] that if the [officers] wanted to make sure that the fish were still [on board], they should have put a mark on their foreheads." J.A. 69. Petitioner then directed novice crewmember Thomas Lemons to throw the 72

undersized fish overboard. *Ibid.* Lemons complied with that order. *Ibid.* He and petitioner then took other, larger, red grouper that they had previously caught and placed them in the crates that had held the undersized fish. J.A. 70. Petitioner instructed Lemons to lie to law enforcement officers and tell them that the fish in the crates were the same fish that Officer Jones had previously determined were undersized. J.A. 71, 77-78.

Several days later, NMFS Special Agent James Kejonen met petitioner and the *Miss Katie* at the port in Cortez, Florida, to investigate Officer Jones's report of undersized fish. J.A. 60-62, 126. Petitioner told Agent Kejonen that all of the undersized fish identified by Officer Jones were still onboard the vessel. J.A. 64. The following day, however, Officer Jones determined that the fish subsequently unloaded from the *Miss Katie* were not the same fish that he had measured and set aside at sea days earlier. J.A. 52-55, 85-88. Under questioning by federal agents, crewmember Lemons eventually told the truth about petitioner's scheme to cover up his offense by throwing the undersized grouper overboard. J.A. 72-73, 127.

2. In May 2010, a grand jury charged petitioner with three crimes: (1) destroying property to prevent a federal seizure, in violation of 18 U.S.C. 2232(a); (2) destroying, concealing, and covering up the undersized fish to impede the NMFS investigation, in violation of 18 U.S.C. 1519; and (3) making a false statement to federal law enforcement officers, in violation of 18 U.S.C. 1001(a)(2). J.A. 6-8. In August 2011, the case proceeded to trial and Officer Jones,

Agent Kejonen, and crewmember Lemons all testified for the prosecution. See J.A. 10-80.

At the end of the government's case-in-chief, petitioner moved for a judgment of acquittal on the Section 1519 count. J.A. 128. Petitioner's counsel argued that Section 1519 is "a documents offense," that it "applies to destruction of records and records only," and that its reference to any "tangible object[]" concerns only "notations in tangible objects, such as computer hard drives, logbooks[, and] things of that nature" and does not include other items "that can be destroyed as part of an investigation." J.A. 91-92. Counsel conceded, however, that "[i]f the government wished to charge [petitioner] with * * * some other type of destruction of evidence, or some other type of impairment of evidence, our position is that there are sections that would have been appropriate for the government to pursue; but [Section 1519] is not one." J.A. 91.

The district court denied the motion. J.A. 115-117. The court emphasized Section 1519's "broad language" and held that "a reasonable jury could determine that a person who throws or causes to be thrown fish overboard in the circumstances of this case is in violation of [Section] 1519." J.A. 116-117.

The jury later found petitioner guilty on the Section 2232(a) and 1519 counts, and it acquitted him of the Section 1001(a)(2) count. J.A. 118-119. The Probation Office calculated a Sentencing Guidelines range of 21 to 27 months' imprisonment. 12/8/11 Sent. Tr. (Tr.) 47. The district court instead granted petitioner a downward variance and sentenced him to 30 days' imprisonment, followed by 36 months' supervised release. Tr. 70-71; J.A. 119-120.

3. The court of appeals affirmed. J.A. 124-134. As relevant here, the court rejected petitioner's argument that the phrase "any * * * tangible object," as used in Section 1519, only applies to items "relat[ing] to recordkeeping" and does not apply to fish. J.A. 131-132; Pet. C.A. Br. 28, 36, 39, 40.

The court of appeals reasoned that "[i]n statutory construction, the plain meaning of the statute controls unless the language is ambiguous or leads to absurd results." J.A. 132 (citation omitted). It explained that undefined words in a statute must be given their "ordinary or natural meaning." *Ibid.* (citing *Smith* v. *United States*, 508 U.S. 223, 228 (1993)). Applying these principles, the court looked to *Black's Law Dictionary*'s definition of "tangible" as "[h]aving or possessing physical form." *Ibid.* (citing *Black's Law Dictionary* 1592 (9th ed. 2009)). The court concluded that a fish is unambiguously a "tangible object" under Section 1519, and it therefore affirmed petitioner's conviction. J.A. 132, 134.

SUMMARY OF ARGUMENT

Section 1519 prohibits the destruction of "any record, document, or tangible object" with the intent to obstruct an investigation or proceeding under the jurisdiction of the federal government. 18 U.S.C. 1519. Petitioner violated that statute when he deliberately destroyed physical evidence—in the form of 72 undersized red grouper—in order to conceal his violations of federal law from the National Marine Fisheries Service.

I. The plain meaning of Section 1519's phrase "any * * * tangible object" unambiguously covers all types of physical evidence. That conclusion follows from standard dictionary definitions of the relevant

terms, and it is confirmed by the broader context in which the provision appears. Section 1519 is a straightforward ban on destroying evidence, which is located in the chapter of Title 18 addressing "Obstruction of Justice." See 18 U.S.C. 1501 *et seq.* The provision logically bans the destruction of all—and not merely some—types of evidence.

Section 1519's origins confirm that the phrase "any record, document, or tangible object" encompasses all physical evidence. That formulation is virtually identical to language that the Model Penal Code, the Brown Commission, state legislatures, and congressional reform proposals had all used—for decades, in the same context—to refer to all varieties of physical evidence. See, *e.g.*, Model Penal Code § 241.7 cmt. 3, at 179 (1980) (explaining that phrase "any record, document or thing" broadly covers "any physical object"). By modeling Section 1519 on those antecedents, Congress necessarily understood the provision to have the same scope.

Section 1519 also tracks language that Congress used in the federal witness-tampering statute, 18 U.S.C. 1512. Since 1982, that statute has prohibited various means of interfering with others in order to prevent the introduction or discovery of any "record, document, or other object" in an official proceeding. See 18 U.S.C. 1512(a) and (b) (2000). It has always been understood to cover all physical evidence. Congress used the same phrase—"record, document, or other object"—when it amended Section 1512 as part of the Sarbanes-Oxley Act. See 18 U.S.C. 1512(c)(1); Corporate Fraud Accountability Act of 2002, Pub. L. No. 107-204, Tit. XI, § 1102, 116 Stat. 807. Congress

did not intend Section 1519's nearly identical language to mean something far narrower.

Finally, the legislative history of the Sarbanes-Oxley Act reinforces the plain meaning of Section 1519. Congress enacted that provision to clarify ambiguities and close loopholes in the existing destruction-of-evidence regime. The Senate Judiciary Committee explained that Section 1519 would "apply broadly to any acts to destroy or fabricate physical evidence" with obstructive intent, and the primary loophole it identified affected all types of physical evidence. 2002 Senate Report 6, 7, 12, 14. The legislative history confirms that when Congress used the broad phrase "any * * * tangible object," it meant what it said.

II. Petitioner's narrow construction of Section 1519 lacks merit. Petitioner argues (Br. 8) that the phrase "any * * * tangible object" covers only a subset of those objects—specifically, "thing[s] used to preserve information, such as a computer, server, or similar storage device." That interpretation has no basis in Section 1519's text or in the broader statutory context. Petitioner relies most heavily on the *noscitur a sociis* and *ejusdem generis* canons of statutory construction. But those canons cannot overcome Section 1519's plain meaning. And even if the canons did apply here, they would confirm that the phrase "any * * * tangible object" covers all physical items relevant to a federal investigation or proceeding. Petitioner's other textual and contextual arguments are equally unavailing.

Petitioner and his amici argue that because Congress enacted Section 1519 as part of the Sarbanes-Oxley Act, the provision should be limited to the kinds of document shredding at issue in the Enron investi-

gation. But Section 1519's text establishes that the provision prohibits the destruction of *any* evidence with improper obstructive intent. Petitioner cannot point to any legislative history directly supporting his novel assertion that the phrase "any * * * tangible object" covers only information-storage devices. Moreover, petitioner's construction creates an arbitrary distinction between documentary evidence and other types of physical evidence that has no basis in the text or purpose of the Sarbanes-Oxley Act. In his view, Section 1519 prohibits a murderer from destroying his victim's diary, but not the murder weapon. Congress surely did not intend such an illogical result.

In any event, as petitioner's own amicus concedes, the Sarbanes-Oxley Act unambiguously banned the destruction of "any kind of object" in 18 U.S.C. 1512(c)(1), which covers any "record, document, or other object." Oxley Amicus Br. 4, 17-18. Congress used a virtually identical phrase in Section 1519 to enact a similar prohibition. Both should be interpreted to reach the same broad universe of physical evidence.

Petitioner's invocation of other principles of statutory construction also fails. It was not absurd for Congress to enact a broad ban on the destruction of evidence. Section 1519 is not vague, and there is accordingly no reason to adopt a narrow construction to avoid a constitutional question. The provision does not manifest a problem with "overcriminalization" of otherwise-innocent conduct. And Section 1519 is not grievously ambiguous, so the rule of lenity does not apply. The Court should decline petitioner's invitation to depart from Section 1519's ordinary meaning.

ARGUMENT

I. SECTION 1519 PROHIBITS THE DESTRUCTION OF ALL TANGIBLE OBJECTS

Petitioner no longer disputes that he deliberately instructed his crew to throw 72 undersized fish overboard—in violation of a direct order by a federal officer of the NMFS—in order to obstruct enforcement of federal law. The only question for this Court is whether a physical item with evidentiary significance counts as "any * * * tangible object" for purposes of 18 U.S.C. 1519. It plainly does. The text, structure, purpose, and history of that provision all confirm that Section 1519 prohibits the destruction of any kind of physical evidence—including fish—so long as the destruction occurs with the requisite obstructive intent.

A. Section 1519 Unambiguously Covers All Physical Evidence

Section 1519's prohibition on destroying, concealing, or covering up evidence applies broadly to "any record, document, or tangible object." That phrase means what it says.

*1. The plain meaning of "any * * * tangible object" covers all physical items*

a. This Court has recently—and repeatedly—emphasized that "in all statutory construction, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014) (citation, brackets, and internal quotation marks omitted); see *Sandifer* v. *United States Steel Corp.*, 134 S. Ct. 870, 876 (2014) (describing this rule as a "fundamental canon of statu-

tory construction"); see also, *e.g.*, *Lawson* v. *FMR LLC*, 134 S. Ct. 1158, 1165 (2014) (applying rule); *Burrage* v. *United States*, 134 S. Ct. 881, 887 (2014) (same); *Sebelius* v. *Cloer*, 133 S. Ct. 1886, 1893 (2013) (same). The ordinary meaning of a statutory term can typically be determined by reference to its dictionary definition. See, *e.g.*, *Octane Fitness*, 134 S. Ct. at 1756; *Burrage*, 134 S. Ct. at 887.

Here, the ordinary meaning of Section 1519's key phrase—"any * * * tangible object"—is plain and unambiguous. The adjective *tangible* means "[h]aving or possessing physical form," *Black's Law Dictionary* 1468 (7th ed. 1999), or being "able to be perceived as materially existent[,] esp[ecially] by the sense of touch," *Webster's Third New International Dictionary* 2337 (2002) (*Webster's Third*); see Pet. Br. 13 n.7 (citing similar definitions). An *object* is, in the relevant sense, "a discrete visible or tangible thing" or "something that is put or may be regarded as put in the way of some of the senses." *Webster's Third* 1555; see Pet. Br. 12 n.6. The phrase *tangible object* therefore plainly encompasses discrete physical items perceptible by the senses.

Section 1519's reference to "*any* * * * tangible object" confirms that the provision covers all such items, and not merely a subset of them. 18 U.S.C. 1519 (emphasis added). The plain meaning of *any* is "one or some indiscriminately of whatever kind," or "one, no matter what one, * * * without restriction or limitation of choice." *Webster's Third* 97. This Court has often acknowledged—and applied—the "expansive meaning" of the word *any* in prior cases. See, *e.g.*, *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 218-220 (2008); *United States* v. *Gonzales*, 520

U.S. 1, 5 (1997); *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 588-589 (1980).

Taken as a whole, Section 1519's reference to "any * * * tangible object" is straightforward and plain. It unambiguously covers the destruction of any discrete physical item, of any type, that might be relevant to a federal investigation or proceeding.

b. That interpretation of Section 1519 is consistent with the other uses of the phrases "tangible object" or "tangible thing" throughout the United States Code and the Federal Rules of Civil and Criminal Procedure.[3] For example, Federal Rule of Criminal Procedure 16(a)(1)(E) requires the government to allow a defendant to inspect and copy or photograph any "tangible object[]" that is under its control and has potential evidentiary value. It is beyond question that the provision plainly encompasses all types of physical items.[4] Likewise, Federal Rule of Civil Procedure

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[3] See, *e.g.*, 2 U.S.C. 386, 388; 7 U.S.C. 7702, 7733, 8302, 8314; 15 U.S.C. 57b-1, 57b-2, 77v, 77z-1, 78u-4, 78aa, 80a-43, 80b-14; 17 U.S.C. 803; 18 U.S.C. 668, 3110; 20 U.S.C. 9172; 21 U.S.C. 876, 967; 28 U.S.C. 2507, 2521; 39 U.S.C. 3016; 49 U.S.C. 20112; 50 U.S.C. 403-3h, 403q, 1861, 1862; Fed. R. Civ. P. 5, 26, 30, 34, 45; Fed. R. Crim. P. 16, 41.

[4] See, *e.g.*, 2 Charles Alan Wright and Peter J. Henning, *Federal Practice and Procedure* § 254, at 108 n.7 (2009) (citing cases establishing that phrase "tangible object" encompasses wide array of physical items, including handwriting specimens, drugs, recording devices, telephone-number listing devices, and water samples); 5 Wayne R. LaFave et al., *Criminal Procedure* § 20.3(g), at 405-406 & n.120 (3d ed. 2007) (noting that Rule 16 and comparable state provisions "ha[ve] been used to obtain disclosure of such items as physical evidence taken from the defendant, photographs of the scene of the crime, and financial records to be used in establishing a white collar crime"); see also Fed. R. Crim. P. 16 advisory

26(b) authorizes a party in litigation to require discovery of "documents" or "tangible things" possessed by an adversary. The purpose of that rule is to allow "either party [to] compel the other to disgorge whatever facts he has in his possession." *Hickman* v. *Taylor*, 329 U.S. 495, 507 (1947). It too unambiguously covers all types of physical items.[5]

2. The structure and purpose of Chapter 73 and Section 1519 reinforce the plain meaning

This Court has emphasized that "the words of a statute must be read * * * with a view to their place in the overall statutory scheme." *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 666 (2007). Interpreting Section 1519's reference to "any * * * tangible object" to encompass all physical evidence makes sense in light of the structure and overarching purpose of both Chapter 73 and Section 1519 itself.

Chapter 73 sets forth criminal offenses encompassing "Obstruction of Justice." 18 U.S.C. 1501 *et seq.* It addresses a wide array of activities calculated to thwart the administration of justice or to improperly

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committee's note (1966) (emphasizing the "necessarily broad and general terms in which the items to be discovered are described").

[5] See, *e.g.*, Jay E. Grenig, *Handbook of Federal Civil Discovery and Disclosure* § 9:12, at 525 (3d ed. 2010) (noting that reference to "tangible things" "enable[s] parties to obtain access to a variety of physical objects[,]" "includ[ing] motor vehicles, machinery or equipment, animals, accident relics, personal possessions, testing equipment, dead bodies, fingerprints, and chemicals or other substances"); 10A John Kimpflen et al., *Federal Procedure* § 26:615, at 369-370 nn.4-6 (2007) (citing cases establishing that wide array of physical objects are discoverable as "[t]angible things," including cars, trucks, ladders, dishwashers, and dead bodies).

influence official proceedings. *Ibid.* Within Chapter 73, Section 1519 targets one particular method of obstructing justice—destroying evidence. It criminalizes such destruction if undertaken for the purpose of impeding the "investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States." 18 U.S.C. 1519.

The objective of both Chapter 73 and Section 1519 is to protect the integrity of government operations, promote fairness to all parties in official proceedings, and ensure that government determinations of factual matters are accurate and true. Those goals are threatened by the destruction of *any* relevant evidence, regardless of its particular form. Although federal investigations and proceedings often involve records and documents, they also frequently entail consideration of physical items—for example, a murder weapon, counterfeit cash, environmental waste, industrial machinery, airplane equipment, medical devices, and so on.

In such cases, destroying, altering, or concealing these physical items—no less than documentary evidence—can both obstruct justice and impair the government's legitimate operations. It is sensible for Congress to prohibit those acts when undertaken with improper intent. That is what Congress did in Section 1519, by outlawing the destruction or concealment of "any record, document, or tangible object" in such circumstances.

In short, the unambiguous meaning of the statutory language fully comports with the structure and purpose of Section 1519 and Chapter 73. That is enough to resolve this case. See *Cloer*, 133 S. Ct. at 1895 ("Our inquiry ceases in a statutory construction

case if the statutory language is unambiguous and the statutory scheme is coherent.") (brackets and internal quotation marks omitted).

B. Congress Modeled Section 1519 On Similar Provisions Long Understood To Cover All Physical Evidence

This Court has recognized that when statutory language "is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." *Sekhar* v. *United States*, 133 S. Ct. 2720, 2724 (2013) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)). Here, Congress borrowed Section 1519's "any record, document, or tangible object" formulation from the Model Penal Code, subsequent reform proposals modeled on that Code, 18 U.S.C. 1512, and other provisions using virtually identical language to prohibit the destruction of all physical evidence. It makes sense to harmonize Section 1519 with the settled understanding of that language.

1. Section 1519 borrowed language from the Model Penal Code and subsequent reform proposals

Congress did not draft Section 1519's text in a historical vacuum. Rather, it drew on a decades-long effort to expressly prohibit the destruction of physical evidence with obstructive intent. That history informs the interpretation of Section 1519 and confirms that the provision covers all physical evidence.

a. The ALI completed the Model Penal Code in 1962. The Code sought to clarify—and in some respects to broaden—the prohibitions on destruction of evidence generally covered by Section 1503's Omnibus Clause and comparable state prohibitions. See Model

Penal Code § 208.26 cmt. at 121-122 & n.31 (Tentative Draft No. 8, 1958); see also Model Penal Code § 241.7 cmts. 1-3, at 175-181 (1980). The Omnibus Clause is a broad catchall provision generally barring interference with the "due administration of justice," 18 U.S.C. 1503; it makes no distinction between types of evidence protected from destruction.

The Model Penal Code prohibited destroying evidence in Section 241.7, which specifically addressed "Tampering With or Fabricating Physical Evidence." That provision imposed misdemeanor liability on any person who "alters, destroys, conceals or removes *any record, document or thing* with purpose to impair its verity or availability in [any official] proceeding or investigation." Model Penal Code § 241.7(1) (emphasis added); see App., *infra*, 36a. The relevant language of Section 241.7 is virtually identical to the corresponding language in Section 1519.

The ALI's official commentary on Section 241.7(1) explained that conduct relating to "any record, document or thing" is "not limited to conduct that prejudices the integrity or availability of a written instrument." Model Penal Code § 241.7 cmt. 3, at 179 (1980). Rather, the commentary explained, that phrase "applies to *any physical object.*" *Ibid.* (emphasis added).

The commentary further noted that the Model Penal Code employs the phrase "record, document or thing"—instead of the simpler term "evidence"—so as to "indicate[] that liability for tampering does not depend on the admissibility at trial of the document or object involved." Model Penal Code § 241.7 cmt. 3, at 179 (1980). It also observed that Section 241.7(1) applies broadly to all official investigations or pro-

ceedings and therefore covers "the full range of contexts in which tampering with or fabricating physical evidence may work an obstruction of justice." *Id.* § 241.7 cmt. 2, at 179 (1980).

b. Many States responded to the Model Penal Code by reforming their criminal laws to reflect Section 241.7's proposed ban on destroying evidence. Gorelick § 5.8, at 190-193; *id.* § 5.8, at 299-305 (2007-2 Supp.). Fifteen States and the District of Columbia now have laws that largely track the Model Penal Code's specific reference to "any record, document or thing." Model Penal Code § 241.7(1).[6] It is well-settled that those state statutes—in accordance with

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[6] Conn. Gen. Stat. Ann. § 53a-155(a)(1) (West 2012) ("any record, document or thing"); D.C. Code § 22-723(a) (LexisNexis 2001) ("record, document, or other object"); Fla. Stat. Ann. § 918.13(1)(a) (West 2006) ("any record, document, or thing"); Ind. Code Ann. § 35-44.1-2-2(2)(a)(3) (LexisNexis 2013) ("any record, document, or thing"); Kan. Stat. § 21-5905(a)(5)(C) (2013) ("any record, document or thing"); Mass. Ann. Laws ch. 268, § 13E(b) (LexisNexis 2010) ("record, document, or other object"); Mo. Ann. Stat. § 575.100(1)(1) (West 2011) ("any record, document or thing"); Mont. Code Ann. § 45-7-207(1)(a) (2013) ("any record, document, or thing"); Nev. Rev. Stat. Ann. § 199.220 (LexisNexis 2012) ("any book, paper, record, writing, instrument or thing"); N.D. Cent. Code § 12.1-09-03(1) (2012) ("record, document, or thing"); Ohio Rev. Code Ann. § 2921.12(A)(1) (LexisNexis 2010) ("any record, document, or thing"); Okla. Stat. Ann. tit. 21, § 454 (West 2002) ("any book, paper, record, instrument in writing, or other matter or thing"); 18 Pa. Cons. Stat. Ann. § 4910(1) (West 1983) ("any record, document or thing"); Tenn. Code Ann. § 39-16-503(a)(1) (2010) ("any record, document or thing"); Tex. Penal Code Ann. § 37.09(a)(1) (West 2013) ("any record, document, or thing"); Utah Code Ann. § 76-8-510.5 (LexisNexis 2012) ("any thing or item," defined to include "any document, record, book, paper, file, electronic compilation, or other evidence"); see App., *infra*, 23a-36a.

their plain meaning and the Model Penal Code commentary—broadly encompass all types of physical evidence. Indeed, when Congress enacted Section 1519, States had regularly used those laws to prosecute the intentional destruction of physical evidence, including drugs, guns, and live animals.[7]

c. At the federal level, Congress responded to the Model Penal Code in part by creating the Brown Commission and charging it with proposing reforms to federal criminal law. Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 Buff. Crim. L. Rev. 45, 93-96 (1998) (Gainer). In 1971, the Commission released its proposal to completely overhaul Title 18 of the United States Code. *Id.* at 96-104; see generally *Final Report of the National Commission on Reform of Federal Criminal Laws* (1971) (*Brown Commission Report*).

Section 1323 of the Brown Commission's draft code proposed a new federal offense of "Tampering With Physical Evidence." *Brown Commission Report*,

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[7] See, *e.g.*, *State* v. *Haase*, 702 A.2d 1187, 1190 (Conn. 1997) (gun), cert. denied, 523 U.S. 1111 (1998); *Timberlake* v. *United States*, 758 A.2d 978, 980 (D.C. 2000) (heroin and cocaine); *State* v. *Jennings*, 666 So. 2d 131, 132 (Fla. 1995) (cocaine); *Mullins* v. *State*, 717 N.E.2d 902, 903 (Ind. Ct. App. 1999) (cocaine); *State* v. *Ford*, 906 S.W.2d 761, 763 (Mo. Ct. App. 1995) (handgun); *State* v. *Nalder*, 37 P.3d 661, 662-663 (Mo. 2001) (chemicals); *State* v. *Lytle*, 551 N.E.2d 950, 951 (Ohio 1990) (gun); *Smith* v. *State*, 288 P. 367, 367 (Okla. Crim. App. 1930) (whiskey bottle); *Commonwealth* v. *Delgado*, 679 A.2d 223, 224 (Pa. 1996) (cocaine); *State* v. *Hawkins*, 406 S.W.3d 121, 125 (Tenn. 2013) (shotgun); *State* v. *Adkisson*, No. M2000-01079-CCA-R3-CD, 2001 WL 1218570, at *1 (Tenn. Crim. App. Oct. 12, 2001) (live dogs); *Raney* v. *State*, 982 S.W.2d 429, 429 (Tex. Crim. App. 1998) (cocaine); *State* v. *Gonzales*, 2 P.3d 954, 956-957 (Utah Ct. App. 2000) (marijuana and gun).

§ 1323(1), at 116-117. Section 1323(1) tracked the relevant language of Model Penal Code Section 241.7(1)'s prohibition on evidence destruction nearly verbatim, imposing liability on anyone who "alters, destroys, mutilates, conceals or removes a *record, document or thing* with intent to impair its verity or availability in [an] official proceeding" that the person believes is "pending or about to be instituted." *Id.* § 1323(1), at 116 (emphasis added); see App., *infra*, 37a. The Brown Commission's use of virtually the same formulation as the Model Penal Code makes clear its intent to encompass the destruction of "any physical object." Model Penal Code § 241.7 cmt. 3, at 179 (1980).

The official commentary to the Brown Commission's draft confirms that intent. That commentary explained that Section 1323 "covers the physical evidence aspects of the current obstruction of justice provisions," including 18 U.S.C. 1503. *Brown Commission Report* § 1323 cmt. at 117. The Brown Commission's official *Working Papers* also noted Section 1323's broad application to "physical evidence" and emphasized that the provision's purpose was "to deny" the existence of any "right to destroy evidence before it has been seized or subpoenaed." *Working Papers of the National Commission on Reform of Federal Criminal Laws* 575-576 (1970) (citation and internal quotation marks omitted).

d. For over a decade following the Brown Commission's proposal, Congress repeatedly considered whether to overhaul Title 18 along the lines suggested by the Commission. See Gainer 111-129 (discussing reform efforts in this period). During this time, numerous bills would have criminalized "Tampering

With Physical Evidence" in language virtually identical to that used by both the Commission and Model Penal Code. Like Section 1519, those provisions each prohibited "alter[ing,], destroy[ing], mutiliat[ing], conceal[ing], or remov[ing]" a "*record, document, or other object*" (emphasis added) with the intent to "impair its integrity or availability in an official proceeding."[8] The committee reports and executive branch commentary on these proposals consistently indicated (1) that the proposed offense would overlap with the evidence destruction offenses covered by Section 1503 and the Brown Commission's draft legislation, and (2) that its language would apply broadly to encompass all forms of evidence.[9]

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[8] See, *e.g.*, H.R. 5703, 97th Cong., 2d Sess. § 1725(a) (1982); H.R. 5679, 97th Cong., 2d Sess. § 1725(a) (1982); H.R. 4711, 97th Cong., 1st Sess. § 1725(a) (1981); S. 1630, 97th Cong., 1st Sess. § 1325(a) (1981); H.R. 6915, 96th Cong., 2d Sess. § 1725(a) (1980); S. 1723, 96th Cong., 1st Sess. § 1725(a) (1979); S. 1722, 96th Cong., 1st Sess. § 1325(a) (1979); S. 1437, 95th Cong., 1st Sess. § 1325(a) (1977); H.R. 2311, 95th Cong., 1st Sess. § 1325(a) (1977); S. 1, 94th Cong., 1st Sess. § 1325(a) (1975); S. 1400, 93d Cong., 1st Sess. § 1325(a) (1973); H.R. 6046, 93d Cong., 1st Sess. § 1325(a) (1973); see also S. 1, 93d Cong., 1st Sess. § 2-6C1 (1973) (covering destruction or concealment of "information or an object" to impede official proceeding); *id.* § 2-6A1(8) (defining "object" as "includ[ing] any animate or inanimate thing"); App., *infra*, 37a-43a.

[9] See, *e.g.*, S. Rep. No. 307, 97th Cong., 1st Sess. 318, 339, 358-359, 1464-1465, 1481 (1981) (1981 Senate Report) (noting that proposed Section 1325 generally tracks Brown Commission proposal, covers destruction-of-evidence offenses encompassed by 18 U.S.C. 1503 (1976), and overlaps with the ban on destroying property to avoid its seizure set forth in 18 U.S.C. 2232 (1976); and also proposing repeal of redundant provisions criminalizing destruction of physical property in specialized circumstances, 33 U.S.C. 938(b) (1976) and 49 U.S.C. 1472(p) (1976)); S. Rep. No. 553, 96th Cong.,

e. When Congress enacted Section 1519 in 2002, it used a phrase—"any record, document, or tangible object"—that was materially indistinguishable from the corresponding language in the Model Penal Code ("record, document or thing"), the *Brown Commission Report* ("record, document or thing"), and the legislation considered in the 1970s and 1980s ("record, document, or other object"). Those broad formulations had a settled legal meaning and were universally understood to encompass—in accordance with their plain language and the Model Penal Code commentary—"any physical object." Model Penal Code § 241.7 cmt. 3, at 179 (1980). This Court should give the same meaning to the corresponding phrase in Section 1519.

2. Section 1519 is modeled on Section 1512

Congress also modeled the relevant language of Section 1519 on 18 U.S.C. 1512, the witness-tampering provision enacted in 1982 after broader efforts to reform the criminal code failed. See Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 4, 96 Stat. 1249; 1982 Senate Report 10. Section 1512

2d Sess. 297, 317, 336-337, 1367, 1382-1383 (1980) (same); *Criminal Justice Reform Act of 1975: Report of the Senate Comm. on the Judiciary to Accompany S.1*, 94th Cong., 1st Sess. 360-361 (1975) (Comm. Print) (similar); *Reform of the Federal Criminal Laws: Hearings Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 7473 (1974) (testimony of Asst. Att'y Gen. Henry E. Petersen) (explaining that Section 1325 of S. 1400 "punishes any tampering with physical evidence"); *id.* at 7486, 7490, 7493, 7497-7498 (reprinting Memorandum on the Offenses Set Forth In Chapter 13 of the Criminal Code Reform Act, Dep't of Justice) (noting that proposed Section 1325 "covers the offense of tampering with physical evidence" currently addressed by 18 U.S.C. 1503 (1970)).

repeatedly uses the phrases "record, document, or other object" and "object" to refer to all physical evidence. Section 1519 uses essentially the same language and should be interpreted the same way. See *Wachovia Bank, NA* v. *Schmidt*, 546 U.S. 303, 315-316 (2006) ("[U]nder the *in pari materia* canon of statutory construction, statutes addressing the same subject matter generally should be read as if they were one law.") (citations and internal quotation marks omitted).

a. When Congress enacted Section 1519, Section 1512 already used the phrase "record, document, or other object" as part of three different witness-tampering provisions. Specifically:

- Section 1512(a)(1)(B) prohibited "kill[ing] another person, with intent to * * * prevent the production of a *record, document or other object*, in an official proceeding";
- Section 1512(b)(2)(A) prohibited using intimidation, force, threats, corrupt persuasion, or misleading conduct to induce another person to "withhold a *record, document, or other object*, from an official proceeding"; and
- Section 1512(b)(2)(C) prohibited using the same means to induce another person to "evade legal process summoning that person * * * to produce a *record, document, or other object*, in an official proceeding."

18 U.S.C. 1512(a)(1)(B), (b)(2)(A) and (C) (2000) (emphases added); see App., *infra*, 3a-4a. In addition, Section 1512(b)(2)(B) (2000) prohibited inducing another person to alter, destroy, mutilate, or conceal any

"object" in order to impair its integrity or availability in such a proceeding. See App., *infra*, 4a.[10]

The unambiguous purpose of those provisions was—and is—to prohibit tampering that impedes the introduction or consideration of *any* type of evidence in an official proceeding.[11] No one would say that they cover only a subset of such materials—such that, for example, Section 1512(a)(1)(B) makes it illegal to murder a witness to prevent him from giving police an incriminating letter, but not to prevent him from turning over a bloody knife. Indeed, Section

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[10] At the time, other provisions barring retaliation against witnesses, victims, and informants—18 U.S.C. 1513(a)(1)(A) and (b)(1) (2000)—similarly employed the same "record, document, or other object" formulation. Several months after passing the Sarbanes-Oxley Act, Congress modified Section 1512 by moving Section 1512(b)'s prohibition on using force to tamper with witnesses to a new Section 1512(a)(2). See 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 3001, 116 Stat. 1803; see also 18 U.S.C. 1512(a)(2) (2000 & Supp. II 2002).

[11] See, *e.g.*, *Omnibus Victims Protection Act: Hearing Before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 55 (1982) (analysis of Hon. Hamilton Fish, Jr.) (explaining that Section 1512 would criminalize force or intimidation used to "cause another to withhold testimony or evidence, destroy or conceal evidence, or evade a summons to * * * produce evidence in an official proceeding"); *id.* at 91 (statement of Asst. Att'y Gen. D. Lowell Jensen) (explaining that Section 1512 incorporates the reforms proposed in Sections 1323 and 1324 of the Criminal Code Reform Act, S. 1630, as explicated in 1981 Senate Report); 1981 Senate Report 318 & n.24 (describing Section 1323 in S. 1630 as a provision combatting "[e]fforts to alter, hide, or destroy evidence"); see also, *e.g.*, *United States* v. *Johnson*, 655 F.3d 594, 603-604 (7th Cir. 2011) (discussing broad scope of Section 1512's phrase "record, document, or other object"); 1982 Senate Report 16 (explaining that Section 1512 was based on *Brown Commission Report*).

1512(b)(2)(C)'s prohibition on inducing a person to evade legal process requiring him to produce any "record, document, or other object" plainly covers the full range of items subject to pre-trial discovery, including any of the "documents" or "tangible things" subject to Federal Rules of Civil Procedure 26(b) and 34(a). See pp. 16-17, *supra*. Courts applying Section 1512(b)(2)(B)—both before and after 2002—have uniformly recognized that its prohibition encompasses all types of physical evidence.[12]

b. When Congress used the phrase "any record, document, or tangible object" in Section 1519, it modeled that language on Section 1512's virtually identical references to "record, document, or other object." In light of the strong textual similarity between the two provisions—and the universal understanding that Section 1512 encompasses all types of physical evidence—Section 1519 likewise applies to all physical items. Cf. *Rowe* v. *New Hampshire Motor Transp. Ass'n*, 552 U.S. 364, 370 (2008) (applying settled interpretation of one statutory provision to "similar language" in subsequently-enacted statute); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978).

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[12] See, *e.g.*, *United States* v. *England*, 555 F.3d 616, 617-618 (7th Cir. 2009) (car); *United States* v. *Kellington*, 217 F.3d 1084, 1087-1089, (9th Cir. 2000) (stereo equipment, cash, briefcase, and boat); *United States* v. *Applewhaite*, 195 F.3d 679, 688 (3d Cir. 1999) (blood spatter); *United States* v. *MacFarlane*, No. 96-30296, 1998 WL 75694, at *1 (9th Cir. Feb. 23, 1998) (cash-filled briefcase); *United States* v. *Frankhauser*, 80 F.3d 641, 646-647, 651-652 (1st Cir. 1996) (racist flags and Adolf Hitler photographs); note 1, *supra* (citing cases applying Section 1512(c)(1)); see also *Johnson*, 655 F.3d at 603-605 (discussing meaning of "record, document, or other object" more generally).

c. That conclusion is confirmed by Congress's simultaneous enactment of Section 1512(c)(1) as part of the Sarbanes-Oxley Act. See p. 5, *supra*. Like Section 1519, that provision criminalizes the destruction or concealment of any "record, document, or other object" with the intent to obstruct an official proceeding, and it too imposes a maximum penalty of a fine and up to 20 years' imprisonment. 18 U.S.C. 1512(c)(1).

As petitioner's amicus correctly acknowledges, Section 1512(c)(1)'s reference to any "record, document, or other object" is "exceedingly broad," covers "any kind of object," and prohibits "any alteration of anything." Oxley Amicus Br. 4, 17-18. Nothing indicates that Congress's intent was any narrower with respect to Section 1519's corresponding formulation—"any record, document, or tangible object." Indeed, both provisions use the same word ("object") in near-identical phrases, and "[t]he normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning." *Sorenson* v. *Secretary of the Treasury*, 475 U.S. 851, 860 (1986) (citations and internal quotation marks omitted); see *Erlenbaugh* v. *United States*, 409 U.S. 239, 243-244 (1972) (noting that *in pari materia* canon of construction applies with special force to statutes "enacted by the same legislative body at the same time"); p. 49 & note 23, *infra* (noting contemporaneous view that Section 1519 and Section 1512(c)(1) largely overlap).

C. The Legislative History Further Confirms That Section 1519 Covers All Physical Evidence

The legislative history of the Sarbanes-Oxley Act reinforces the conclusion that Section 1519 prohibits

the destruction of all physical evidence, just as its text indicates.

1. Section 1519 originated in the Senate as part of S. 2010, a standalone bill developed by the Judiciary Committee under Chairman Patrick Leahy in the spring of 2002. 2002 Senate Report 1-2.[13] It was prompted by revelations that Enron and its outside accounting firm—Arthur Andersen LLP—had deliberately destroyed large quantities of documents in an effort to conceal fraudulent accounting practices. *Id.* at 2-11. Enron's conduct led the Judiciary Committee to conclude that "current federal obstruction of justice statutes relating to document destruction" were "riddled with loopholes and burdensome proof requirements." *Id.* at 6; see *id.* at 14; 148 Cong. Rec. 2945-2946 (2002) (statement of Sen. Leahy).

The Judiciary Committee identified two major loopholes: (1) Section 1512(b) "ma[d]e it a crime to persuade another person to destroy documents, but not a crime for a person to destroy the same documents personally"; and (2) Section 1503 had been "narrowly interpreted by courts * * * to apply only to situations when the obstruction of justice may

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[13] In July 2002, the Senate incorporated S. 2010 as an amendment to the broader package of financial-sector reforms then being prepared by the Senate Committee on Banking, Housing, and Urban Affairs, under the chairmanship of Senator Paul Sarbanes. 148 Cong. Rec. 12,507-12,508. The Senate approved the Sarbanes bill on July 15, and the conference committee reconciling that bill with a competing reform proposal from the House of Representatives retained Section 1519 in the conference report issued on July 24. *Id.* at 12,960-12,961; H.R. Rep. No. 610, 107th Cong., 2d Sess. 57, 64 (2002). The compromise bill passed both Houses of Congress on July 25, and President George W. Bush signed the bill into law on July 30. Legis. History n., 116 Stat. 810.

be closely tied to a judicial proceeding." 2002 Senate Report 6-7 (citing *United States* v. *Aguilar*, 515 U.S. 593 (1995) and *United States* v. *Frankhauser*, 80 F.3d 641 (1st Cir. 1996)); see *id.* at 14 (same); 148 Cong. Rec. at 2945-2946 (statement of Sen. Leahy) (same).

The Senate Report criticized Chapter 73's "patchwork of various [obstruction-of-justice] prohibitions" and stated that "the current laws regarding destruction of evidence are full of ambiguities and limitations that must be corrected." 2002 Senate Report 6-7. It declared that, "[w]hen a person destroys evidence with the intent of obstructing any type of investigation and the matter is within the jurisdiction of a federal agency, overly technical legal distinctions should neither hinder nor prevent prosecution and punishment." *Id.* at 7.

2. Section 1519 was the Judiciary Committee's principal means of eliminating the ambiguities, loopholes, and overly technical distinctions identified above. Although the Committee was spurred to action by Enron's document destruction, the provision it drafted ranged well beyond the corporate wrongdoing at issue there. Section 1519 did not narrowly target white-collar fraud, but instead broadly prohibited *any* destruction of evidence for the purpose of impeding the "proper administration of *any* matter within the jurisdiction of *any* department or agency of the United States, or *any* [bankruptcy] case filed under title 11." 18 U.S.C. 1519 (emphasis added). The breadth of that language makes clear that Congress sought to overhaul Chapter 73's treatment of evidence destruction across the board.

The Senate Report declared that S. 2010's overarching "Purpose" included "provid[ing] for criminal

prosecution and enhanced penalties of persons who * * * alter or destroy evidence in certain Federal investigations." 2002 Senate Report 2; see *id.* at 1 (same); 148 Cong. Rec. at 2945 (statement of Sen. Leahy) (same). The Report did not distinguish between different *types* of evidence—and it certainly did not suggest that Section 1519's reference to "any record, document, or tangible object" encompassed only a subset of physical items.[14]

On the contrary, the Senate Report made clear that Section 1519 was intended to prohibit the destruction of *all* physical evidence:

> Section 1519 is meant to apply broadly to *any acts to destroy or fabricate physical evidence* so long as they are done with the intent to obstruct, impede or influence the investigation or proper administration of any matter, and such matter is within the jurisdiction of an agency of the United States.

2002 Senate Report 14 (emphasis added).

The Senate Report's section-by-section analysis reinforced that statement of Section 1519's purpose,

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[14] See also, *e.g.*, 2002 Senate Report 26-27 (providing "Additional Views" of Sens. Brownback, DeWine, Grassley, Hatch, Kyl, McConnell, Sessions, and Thurmond) (noting that Section 1519 "should be used to prosecute * * * those individuals who destroy evidence with the specific intent to impede or obstruct" criminal investigations, administrative proceedings, and bankruptcy cases); 148 Cong. Rec. at 12,316 (statement of Sen. Daschle) (noting that one of S. 2010's "three aims" was "preserving evidence"); *id.* at 12,494 (statement of Sen. McCain) (explaining that S. 2010 would give prosecutors "the tools to incarcerate persons who * * * alter or destroy evidence in certain Federal Investigations"); *id.* at 12,517 (statement of Sen. Hatch) (explaining that Section 1519 "would permit the government to prosecute an individual who acts alone in destroying evidence").

explaining that the provision "could be effectively used in *a wide array of cases where a person destroys or creates evidence* with the intent to obstruct an investigation or matter that is within the jurisdiction of any federal agency or any bankruptcy." 2002 Senate Report 12 (emphasis added). Senator Leahy echoed those explanations on the Senate floor, emphasizing that Section 1519 could be used "in a *wide array of cases in which a person destroys evidence* with the specific intent to obstruct" an investigation or proceeding within federal jurisdiction. 148 Cong. Rec. at 2946 (emphasis added). Those statements provide strong support for interpreting Section 1519's broad reference to "any * * * tangible object" to encompass all physical evidence.

3. The Senate Report's discussion of the "loopholes" that Section 1519 was designed to close provides additional support for interpreting the provision to cover the destruction of any physical evidence. One such loophole was the anomaly that while Section 1512(b)(2) prohibits any person from persuading another person to destroy any "object" with obstructive intent, it does not prohibit that same person from destroying that same evidence himself. 2002 Senate Report 6-7, 12, 14 & n.13.[15]

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[15] That loophole arose because Congress based Section 1512 on Sections 1323 and 1324 of the proposed Criminal Code Reform Act of 1981, S. 1630, 97th Cong., 1st Sess. (1981), a more comprehensive proposal to reform Title 18 that had also included a separate provision (Section 1325) prohibiting a person from destroying evidence himself. See 1982 Senate Report 10, 15. Shortly after S. 1630 failed to pass, Congress enacted a narrower bill—focused on witness tampering—that contained Section 1512 but did not include Section 1325's prohibition on personally destroying evi-

As noted above, courts had already applied Section 1512(b)(2)'s prohibition on destroying "object[s]" to a wide array of physical evidence, including cash, a briefcase, and a boat. See note 12, *supra* (citing cases). The Judiciary Committee was undoubtedly aware of this construction. Indeed, both the Senate Report and Senator Leahy himself repeatedly referenced the First Circuit's decision in *Frankhauser*, which affirmed a Section 1512(b)(2)(B) conviction for inducing a witness to destroy physical evidence in the form of Nazi and Confederate flags and photographs of Adolf Hitler. 2002 Senate Report 6-7, 14 n.14; 148 Cong. Rec. at 2946 (statement of Sen. Leahy); see *Frankhauser*, 80 F.3d at 646-647, 651-652.

All agree that the Judiciary Committee intended Section 1519 to address Section 1512(b)'s loophole and remedy the absence of a direct prohibition on destroying evidence. See, *e.g.*, Oxley Amicus Br. 11-14; Crim. Law Professors Amicus Br. 32; Cause of Action Amicus Br. 4, 7-8. But the only way Section 1519 actually accomplishes that objective is if its reference to "any record, document, or tangible object" covers all of the "object[s]" also encompassed by Section 1512(b)(2). Otherwise the loophole survives with respect to physical evidence that would not qualify as a "record, document, or tangible object" under a narrower construction of that term.

It is hard to imagine that the Judiciary Committee—having announced its goal of "plug[ging]" the Section 1512(b)(2) loophole and eliminating "overly technical legal distinctions" in the destruction-of-evidence regime, 2002 Senate Report 6-7, 12—would

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dence. See Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, § 4, 96 Stat. 1249; 1982 Senate Report 10, 15.

have intended *sub silentio* to preserve that very same loophole with respect to important types of physical evidence.

II. PETITIONER'S NARROW CONSTRUCTION OF SECTION 1519 LACKS MERIT

Petitioner argues (Br. 8) that he can escape liability for deliberately destroying evidence because Section 1519 covers only the destruction of records, documents, and "thing[s] used to preserve information, such as a computer, server, or similar storage device." His construction of Section 1519 is flawed.

A. Neither Text Nor Context Supports Limiting "Any * * * Tangible Object" To Information-Storage Devices

Petitioner concedes (Br. 10) that Section 1519's phrase "any * * * tangible object" is "elastic enough to encompass a fish." He nonetheless raises a series of textual and contextual arguments against applying the plain meaning of that phrase and in support of his narrower construction. None is persuasive.

1. Dictionary definitions convey the ordinary, commonsense meaning of "tangible object"

Petitioner does not seriously question the court of appeals' conclusion that the standard meaning of the phrase "tangible object" encompasses any object "[h]aving or possessing physical form." J.A. 132 (brackets in original) (quoting *Black's Law Dictionary* 1592 (9th ed. 2009)). Instead, he dismisses (Br. 12) the dictionary as an "unhelpful" guide "because it defines the words 'tangible' and 'object' so generally that the phrase 'tangible object' is chameleon-like" and "adapts to whatever context it is used in." He supports that assertion by citing the standard diction-

ary definitions of "tangible" as "capable of being touched or "capable of being realized by the mind" and of "object" as "a discrete visible or tangible thing." Br. 12-13 (quoting *Webster's Third* 1555, 2337).

Petitioner is wrong to suggest (Br. 12) that the ordinary meaning of "tangible object" is "chameleon-*like*." *In fact*, as petitioner's own dictionary definitions establish, it ordinarily means the same thing, referring to any discrete item or thing that is capable of being touched or otherwise perceived by the senses. See Pet. Br. 12-13 & nn.6-7. Petitioner cannot point to any ordinary understanding of the term "tangible object" that refers exclusively to some—but not all—such items.[16] That makes "tangible object" unlike the quite different terms at issue in the various cases he relies upon (Br. 11-12, 14, 16-17) for support.[17]

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[16] Petitioner may be right (Br. 14) that a person who says "Apple sells tangible objects" is probably referring to electronic devices, but that is only because those are the tangible objects for which Apple is best known—not because there is some specialized understanding of that term that applies *only* to such devices. If a person is asked, "Does Apple sell tangible objects?," he is perfectly correct to answer "Yes, it sells gift cards, headphones, and backpacks," even though these items are not "MacBooks, iMacs, iPhones, iPads, [or] other similar electronic 'i' products," Pet. Br. 14; see *All Accessories*, http://store.apple.com/us/accessories/all-accessories (last visited Aug. 6, 2014).

[17] See, *e.g.*, *Caraco Pharm. Labs., Ltd.* v. *Nordisk A/S*, 132 S. Ct. 1670, 1681-1683 (2012) (applying one of two common usages of phrase "not an"); *Federal Aviation Admin.* v. *Cooper*, 132 S. Ct. 1441, 1448-1453 (2012) (deciding between ordinary meaning and various legal meanings of term "actual damages"); *Jarecki* v. *G. D. Searle & Co.*, 367 U.S. 303, 308 (1961) (applying technical meaning of "discovery" instead of ordinary meaning); *McBoyle* v. *United*

To the extent petitioner's real point is that the phrase "any * * * tangible object" is broad—and can therefore encompass a wide array of different objects, from cars to iPhones (Br. 13-14)—he is correct. That is precisely why Congress used that phrase—to ensure that Section 1519 would "apply broadly to *any acts to destroy or fabricate physical evidence*" with improper obstructive intent. 2002 Senate Report 14.

2. Noscitur a sociis and ejusdem generis do not support petitioner

Petitioner leans heavily (Br. 16-19) on two related canons of statutory construction, *noscitur a sociis* and *ejusdem generis*, to support his narrow reading of Section 1519. Under *noscitur a sociis*, "an ambiguous term may be given more precise content by the neighboring words with which it is associated." *United States* v. *Stevens*, 559 U.S. 460, 474 (2010) (citation and internal quotation marks omitted). The *ejusdem generis* canon counsels that, where general words follow an enumeration of specific terms, the general words may be read to embrace only other items similar to those expressly enumerated. *Garcia* v. *United States*, 469 U.S. 70, 74-75 (1984).

Neither canon supports petitioner here. First, this Court uses those canons only to resolve ambiguity or uncertainty in the meaning of a statute. See, *e.g.*, *Stevens*, 559 U.S. at 474-475; *United States* v. *Turkette*, 452 U.S. 576, 581 (1981); 2A Norman J. Singer & Shambie Singer, *Statutes and Statutory Construction* § 47:16, at 361 (7th ed. 2014) (Singer); *id.* § 47:18, at

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States, 283 U.S. 25, 26-27 (1931) (applying everyday meaning of "vehicle" instead of literal meaning).

387-388. The canons are "no more than an aid to construction," *Turkette*, 452 U.S. at 581, and they may not be used "to create ambiguity where the statute's text and structure suggest none," *Ali*, 552 U.S. at 227. This Court has emphasized that it will "not woodenly apply limiting principles every time Congress includes a specific example along with a general phrase." *Ibid.*

Here, as discussed, the meaning of the phrase "any record, document, or tangible object" is not uncertain. That phrase "contains little ambiguity * * * [given] the ordinary meaning of the[] words," *Stevens*, 559 U.S. at 474—especially when those words are read in light of the broader statutory and historical context. See pp. 14-35, *supra*. Although petitioner's canons can help "to avoid * * * giving * * * unintended breadth to the Acts of Congress," *Jarecki* v. *G. D. Searle & Co.*, 367 U.S. 303, 307 (1961), they may not be used to "defeat Congress'[s] intent" when Congress legislates broadly, as it did here, *Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2171 (2012). Petitioner cites no historical evidence that Congress intended the phrase "any * * * tangible object" to refer *only* to "thing[s] used to preserve information, such as a computer, server, or similar storage device." Br. 8.

Even if *noscitur a sociis* or *ejusdem generis* were relevant here, they would not support petitioner's contention that "any * * * tangible object" refers only to storage devices containing records or documents. That unnatural construction almost certainly renders the term "tangible object" superfluous. The destruction of an information-storage device presumably entails the destruction of the records or documents it contains—in which case that destruction can

be prosecuted under Section 1519 without relying on its term "tangible object." But the canons may not be used to "render the general statutory language [in a provision] meaningless." *Christopher*, 132 S. Ct. at 2171 (citing *United States* v. *Alpers*, 338 U.S. 680, 682 (1950)); see Singer § 47:21, at 397-399 (same).

More fundamentally, *noscitur a sociis* and *ejusdem generis* require careful identification of the common "core of meaning" that the specific terms share and that can then inform the interpretation of the more general term. *Graham Cnty. Soil & Water Conservation Dist.* v. *United States*, 559 U.S. 280, 293, 306 (2010); see *Ali*, 552 U.S. at 225-226. A court must identify the common principle unifying the specific terms reasonably—and at the proper level of generality—in light of the statute's overarching subject and purpose. See Singer § 47:18, at 389-393.

Here, although petitioner is correct (Br. 18) that records and documents are both means of "preserving information," they also share the common attribute of providing information that—if destroyed or concealed—would impair official investigations or proceedings. That same attribute is also shared by non-documentary physical evidence, which likewise provides relevant information about the matter under consideration. In a federal investigation of a deadly plane crash, a defective engine part can be just as valuable and informative as a document describing that part. And an undersized fish can be just as valuable as a fisherman's ledger noting the length of each day's catch.

Petitioner's error is to assume that because records and documents both contain information, "any * * * tangible object" must refer only to physical

items that *store* information. In the obstruction-of-justice context at issue here, it is far more logical to construe that phrase to include any physical item *providing* information that is relevant to the matter under investigation or review. That naturally includes any physical evidence of the underlying offense—whether in the form of guns, drugs, bodies, incriminating backpacks, or fish.[18]

3. The title and section headings do not limit Section 1519's ordinary meaning

Petitioner also relies (Br. 20) on (1) Section 1519's appearance in Section 802 of the Sarbanes-Oxley Act, which is entitled "Criminal Penalties for Altering Documents"; and (2) Section 1519's heading, which refers to "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy." But "the title of a statute and the heading of a section cannot limit the plain meaning of the text." *Brotherhood of R.R. Trainmen* v. *Baltimore & Ohio R.R.*, 331 U.S. 519, 528-529 (1947). As this Court

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[18] Petitioner's amicus suggests that reading "any * * * tangible object" to refer to all physical evidence violates the rule against surplusage, because it would render the statutory terms "record" and "document" superfluous. Crim. Law Professors Amicus Br. 22-24. Amicus is correct that records or documents are tangible objects. But the broader statutory and historical context makes clear that Congress intended Section 1519's phrase to encompass all types of evidence, and in any event the use of a general term at the end of a list of more specific references will often produce some redundancy. See generally *Ali*, 552 U.S. at 227-228 (rejecting application of rule against surplusage despite redundancy); *United States* v. *Thompson/Center Arms Co.*, 504 U.S. 505, 521 (1992) (Scalia, J., concurring in judgment) (noting that "an inflexible rule of avoiding redundancy will produce disaster").

recently observed—also in a case addressing the Sarbanes-Oxley Act—headings are often "short-hand reference[s]" that do not substitute for or limit the text's detailed provisions. *Lawson*, 134 S. Ct. at 1169. Here, although Section 802's heading refers only to "[d]ocuments"—and although Section 1519's heading refers only to "records"—the statutory text addresses "any record, document, or tangible object." As in *Lawson*, "the under-inclusiveness of the * * * headings * * * is apparent." *Ibid.*

The titles and headings are especially poor guides to meaning here, in the context of the Sarbanes-Oxley Act's amendments to Chapter 73. In *Lawson*, the Court declined to rely on the title and section headings for 18 U.S.C. 1514A in light of their mismatch with the statutory text. 134 S. Ct. at 1169. Moreover, Congress placed its other new prohibition on destruction of evidence—Section 1512(c)(1)—in the section of Chapter 73 addressing "Tampering with a witness, victim or informant," even though that provision has nothing to do with such tampering. See 18 U.S.C. 1512. In these circumstances, there is no reason to presume that Section 1519's heading precisely mirrors the scope of its text.

4. The prohibition on "mak[ing] a false entry in" evidence does not restrict the scope of "any * * * tangible object"

Petitioner also emphasizes (Br. 19) the statutory bar on "mak[ing] a false entry" in a "record, document, or tangible object." 18 U.S.C. 1519. Petitioner argues (Br. 19) that "[a] false entry can be made in a document, record, or other thing that is used to preserve information, such as a computer, server, or similar storage device," but that it "cannot be made in

every thing" and "cannot be made in a fish." Petitioner's point appears to be that Section 1519 only applies to the types of items in which false entries *can* be made.

That argument rests on the false premise that every one of Section 1519's list of obstructive verbs must necessarily be a perfect fit with each of its three evidentiary nouns. But no reason exists for that to be true. Section 1519 covers "any record, document, or tangible object" that can potentially be the subject of *any* of the provision's verbs (which the statute lists in the disjunctive), even if it cannot necessarily be the subject of *all* of them. Cf. *Robers* v. *United States*, 134 S. Ct. 1854, 1858 (2014) ("[T]he law does not require legislators to write extra language specifically exempting, phrase by phrase, applications in respect to which a portion of a phrase is not needed.").

That interpretation of Section 1519's syntax is consistent with 18 U.S.C. 1505, which contains a similar structure. Among other things, Section 1505 imposes liability on any person who—in order to obstruct compliance with a civil investigative demand issued under the Antitrust Civil Process Act, 15 U.S.C. 1311 *et seq.*—"willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand." 18 U.S.C. 1505. Congress plainly sought to prohibit efforts to "withhol[d] [or] "misrepresent[] * * * oral testimony," even though the other obstructive verbs ("removes * * * , conceals, covers up, destroys, mutilates, alters") do not apply to oral testimony. See Hart-Scott-Rodino Antitrust Improve-

ments Act of 1976, Pub. L. No. 94-435 §§ 102, 105, 90 Stat. 1384, 1389 (amending Antitrust Civil Process Act and Section 1505 to cover oral testimony).

Petitioner's argument leads to the untenable conclusion that most *documents* are also outside of Section 1519's scope. By definition, an "entry" is "an item written in a record," *Black's Law Dictionary* 554 (7th ed. 1999), or "a record or notation (as in a journal, diary, or account book) of a particular day's occurrences or of some transaction or proceeding," *Webster's Third* 759. One does not make "entr[ies]" in many types of documents that are relevant even in white-collar fraud cases—for example, letters, emails, and contracts. It makes no sense to exclude such documents from Section 1519's coverage, as petitioner himself elsewhere appears to acknowledge. See Pet. Br. 18 & n.11 (embracing dictionary definitions of "document"); *id.* at 20, 21 (implying that Section 1519 would cover the destruction of emails). But if Section 1519 covers *all* documents—regardless of whether they can be subject to "false entr[ies]"—then it likewise covers *all* "tangible object[s]."[19]

5. The Sentencing Commission's definition of "tangible object" does not support petitioner

Petitioner also erroneously relies (Br. 21-22) on the amendments to the Sentencing Guidelines that the Sentencing Commission adopted in response to the Sarbanes-Oxley Act. See Sentencing Guidelines,

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[19] Petitioner's logic would also exclude from Section 1519's scope any "tangible object" that cannot be "falsifie[d]." 18 U.S.C. 1519. But if so, then his rule excludes even his own paradigmatic examples of what counts as a "tangible object." It is not natural to speak of "falsif[ying]" a "computer, server, or * * * storage device." Pet. Br. 8.

§ 2J1.2 & comment. (n.1) (2003) (2003 Guidelines); *Id.* App. C, Amends. 647, 653. Petitioner notes (Br. 21-22) that the Commission enhanced the Guidelines penalties for offenses involving the "destruction, alteration, or fabrication of a substantial number of *records, documents, or tangible objects*." He then relies on the Commission's commentary stating that "'[r]ecords, documents, or tangible objects' *includes* * * * records, documents, or tangible objects that are stored on, or that are, magnetic, optical, digital, other electronic, or other storage mediums or devices" as support for his narrow construction of Section 1519's phrase "any * * * tangible object" to refer only to information-storage devices. *Id.* at 22 (emphasis added). And he asserts (*ibid.*) that Congress "tacit[ly] approv[ed]" that definition by failing to reject it under 28 U.S.C. 994(p).

Petitioner's argument is flawed in at least three respects. First, Congress has not vested the Sentencing Commission with authority to interpret or define Section 1519, and the meaning of that provision must therefore be determined by the courts, using traditional tools of statutory construction. This Court has "never held that, when interpreting a term in a criminal statute, deference is warranted to the Sentencing Commission's definition of the same term in the Guidelines." *DePierre* v. *United States*, 131 S. Ct. 2225, 2236 (2011). Such deference is especially inappropriate where, as here, the Commission's definition does not even purport to interpret the statute. *Ibid.* Nor is Congress's failure to reject the definition tacit approval of the Commission's analysis. *Id.* at 2236 n.13.

Second, and in any event, the Sentencing Commission's definition of "records, documents, or tangible objects" is not intended to be exhaustive. It states that the phrase "*includes*" such items that are "stored on, or that are" electronic or other non-traditional "storage mediums or devices," but it does not say that the phrase is *limited* to such items. 2003 Guidelines § 2J1.2 comment. (n.1) (emphasis added). In fact, the Guidelines say the opposite. *Id.* § 1B1.1 comment. (n.2) ("The term 'includes' is not exhaustive."). The Commission's definition is entirely consistent with the plain meaning of Section 1519, and it provides no support to petitioner's more restrictive interpretation.[20]

Finally, petitioner ignores that the Sentencing Commission added the Guidelines' reference to "records, documents, or tangible objects" not to implement any specific command set forth in 18 U.S.C. 1519, but rather to carry into effect Sections 805(a) and 1104(b) of the Sarbanes-Oxley Act. See 2003 Guidelines App. C, Amends. 647, 653. Those provisions instructed the Commission to ensure that the base offense level and enhancements are adequate in cases (1) where the "destruction, alteration, or fabrication of *evidence* involves * * * a large amount of *evidence*," and (2) where "*documents or other physical evidence* are actually destroyed or fabricated." Sarbanes-Oxley Act §§ 805(a)(2)(A)(i), 1104(b)(4), 116 Stat. 802, 809. (emphases added). In other words, the Commission interpreted the Sarbanes-Oxley Act's

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[20] The Probation Office erroneously treated the Sentencing Commission's definition of "tangible object" as exhaustive when it calculated petitioner's sentencing range. Presentence Investigation Report para. 38. The government did not object to that error below.

references to "evidence" and "documents or other physical evidence" as synonymous with the phrase "records, documents, or tangible objects." The Commission's analysis is correct, but it is inconsistent with petitioner's view that the latter phrase excludes all physical evidence apart from information-storage devices.

B. Section 1519's Origins In The Sarbanes-Oxley Act Do Not Trump Its Plain Meaning

Petitioner and his amici emphasize Section 1519's origins in the Sarbanes-Oxley Act and its response to the mass destruction of corporate records by Enron and Arthur Andersen. See, *e.g.*, Pet. Br. 3, 9, 20-21; Chamber of Commerce Amicus Br. 3-6, 12-15; Oxley Amicus Br. 14-16; Crim. Law Professors Amicus Br. 31-32. In light of that history, some of the amici conclude that Section 1519 must be a "supplemental tool for curtailing financial and accounting fraud" concerned only with "the spoliation of corporate record-keeping," Chamber of Commerce Amicus Br. 4, 6, and that its "anti-shredding" prohibition applies only "to the destruction of business records, not any and all kinds of evidence," Oxley Amicus Br. 16-17. That analysis is flawed.

1. No one disputes that Enron's collapse sparked the Sarbanes-Oxley Act, or that Section 1519 was intended to prohibit corporate document shredding to hide evidence of financial wrongdoing. But that does not mean that this was the *only* type of misconduct addressed by that provision. As this Court has repeatedly observed, "statutory prohibitions often go beyond the principal evil [identified by Congress] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal

concerns of our legislators by which we are governed." *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998); see *DePierre*, 131 S. Ct. at 2235. Here, the law in question unambiguously extends beyond Enron-style misconduct; it prohibits a person's destruction of evidence in order to impede the proper administration "of *any* matter within the jurisdiction of *any* department or agency of the United States or *any* [bankruptcy] case filed under title 11." 18 U.S.C. 1519 (emphasis added).[21]

Notably, petitioner does not deny that Section 1519 extends beyond Enron-style misconduct to prohibit the destruction of any records or documents. But he does create an arbitrary distinction between documentary evidence and most kinds of physical evidence (destruction of which he says is not covered). On his view, Section 1519 prohibits a murderer from destroying a threatening letter to his victim (a "document")—but not the murder weapon, his victim's body, or the getaway car. Such a distinction makes little sense as a policy matter, and neither petitioner nor his amici offers any persuasive reason why Congress would have intended such an odd result.

2. In any event, as discussed more fully above, the relevant legislative history confirms that Section 1519

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[21] Further evidence that the Sarbanes-Oxley Act sought to reform the obstruction-of-justice regime generally, and did not focus exclusively on the kind of white-collar fraud at issue in the Enron case, is its enactment of 18 U.S.C. 1513(e). That new anti-retaliation provision imposes liability on whoever "takes any action harmful to any person * * * for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense" with retaliatory intent. 18 U.S.C. 1513(e). Like Section 1519, that provision applies broadly and is not limited to white-collar offenses.

was intended "to apply broadly to any acts to destroy or fabricate physical evidence" with obstructive intent. 2002 Senate Report 14; see pp. 29-35, *supra*. Although petitioners' amici point to several places in which legislators referred to Section 1519 as an "anti-shredding" provision or explained that it would prohibit the destruction of documents, they do not—and cannot—identify a single instance in which anyone ever stated that Section 1519 covered *only* such offenses. Nor can they cite anything in the legislative history specifically supporting petitioner's novel view (Br. 8) that the phrase "any * * * tangible object" refers exclusively to "thing[s] used to preserve information, such as a computer, server, or similar storage device."

3. The assumption that the Sarbanes-Oxley Act could not possibly have been intended to cover the destruction of ordinary physical evidence is also incompatible with Congress's simultaneous enactment of Section 1512(c)(1) as part of that same Act. That provision undeniably covers "any kind of object" and prohibits "any alteration of anything." Oxley Amicus Br. 4, 17-18. It therefore reveals that Congress was not exclusively concerned with the acts of corporate document destruction directly at issue in the Enron affair. And nothing indicates that Congress had only that narrower concern when it enacted Section 1519. Indeed, at the time, many Senators recognized the substantial redundancy between the respective prohibitions in Section 1519 and Section 1512(c)(1).[22]

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[22] See, *e.g.*, 148 Cong. Rec. at 12,513, 12,517 (statements of Sens. Biden, Gramm, Hatch, and Sarbanes) (noting overlap between proposal to add Section 1512(c)(1) and S. 2010); *Senators Leahy and Kennedy Deliver the Democratic Response to the President's*

Congressman Oxley agrees that Section 1519 "was modeled on" Section 1512, but he nonetheless argues that the phrase "other object" in Section 1512(c)(1) encompasses a broader range of items than the phrase "any * * * tangible object" in Section 1519. Oxley Amicus Br. 11, 13-14, 20-21. But the relevant texts of the respective provisions are virtually identical, and Congressman Oxley points to no legislative history supporting his counterintuitive proposition that Congress deliberately used the same basic language to address the same basic problem in two fundamentally different ways. Although Sections 1512(c)(1) and 1519 do significantly overlap, that overlap (1) was openly acknowledged at the time, and (2) reflected the fact that Section 1512(c)(1) was introduced by Senator Lott as a last-minute amendment to the Senate bill in order to reflect proposals made by President George W. Bush.[23] Because Section 1519 was drafted well before Section 1512(c)—and by different people—the legislative record refutes any assumption that the

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Remarks on Corporate Responsibility, Federal Document Clearing House (FDCH), July 9, 2002, www.lexis.com (statement of Sen. Leahy) (same).

[23] See 148 Cong. Rec. at 12,518, 13,088-13,089; Richard A. Oppel, Jr., *Senate Backs Tough Measures to Punish Corporate Misdeeds*, N.Y. Times, July 11, 2002, at A1, C6; see also *Penalties for White Collar Crime: Hearing Before the Subcomm. on Crime and Drugs of the Senate Comm. on the Judiciary*, 107th Cong., 2d Sess. 167-169, 218-224, 263 (2002) (statements of Asst. Att'y Gen. Michael Chertoff and Sen. Leahy). Notably, Section 1512(c) was intended to address the same loophole addressed by Section 1519. See, *e.g.*, *id.* at 169, 223-224 (statement of Asst. Att'y Gen. Chertoff); 148 Cong. Rec. at 12,510, 12,511-12,512, 12,513-12,514, 12,517-12,518; *White House Officials Hold Background White House Briefing*, FDCH, July 9, 2002, www.lexis.com; see also Oxley Amicus Br. 7-8, 14-15.

overlap reflects an intentional scheme in which each provision serves a unique and distinct function.[24]

C. Petitioner's Construction Of Section 1519 Is Not Compelled By Other Principles Of Interpretation

Petitioner and his amici also rely on a series of extra-textual canons and principles in support of a narrow construction of Section 1519. None trumps the straightforward conclusion that the phrase "any * * * tangible object" covers all physical evidence.

1. Prohibiting the destruction of physical evidence is not absurd

Petitioner contends (Br. 23-24) that his novel construction of Section 1519 is necessary to avoid "absurd results." But it is not absurd to prohibit the destruction of evidence to impede the investigation or administration of matters under federal authority. The government has a strong interest in preventing persons from destroying evidence with the purpose of obstructing investigations or proceedings addressing their misconduct. That interest fully extends to all physical evidence that bears on the government's inquiry. That is why destroying such evidence is pro-

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[24] Petitioner's brief does not mention Section 1512(c)(1), and it is not clear whether he believes that provision to prohibit the destruction of ordinary physical evidence (such as fish). Presumably he does not, as his main arguments—about context, canons, purpose, absurdity, and so on—appear to apply with equal force to Section 1512(c)(1). If that is correct, however, petitioner's approach both (1) contradicts Congressman Oxley's analysis, and (2) produces the untenable result that the phrase "record, document, or other object" has a quite different (and much narrower) scope in Section 1512(c)(1) than it does in Sections 1512(a)(1)(B), 1512(a)(2)(B)(i), 1512(a)(2)(B)(iii), 1512(b)(2)(A), and 1512(b)(2)(C). See pp. 25-29, *supra*.

hibited by the Model Penal Code, more than a dozen States, the Brown Commission proposal, and Section 1512(c)(1). See pp. 19-29, *supra*. Those standard prohibitions are not absurd.

Petitioner's primary example of an "absurd result[]" that follows from applying Section 1519's plain meaning is revealing. Petitioner apparently believes (Br. 23) that if a major car manufacturer learns that the brake system on its vehicles is defective—and if it is specifically instructed by the National Highway Traffic and Safety Administration to retain the faulty parts for subsequent examination by federal investigators—it is perfectly acceptable for the manufacturer to destroy the parts, even if its specific purpose in doing so is to obstruct the investigation. Still more, he believes that it would be absurd for Congress to prohibit such conduct. Neither of those beliefs finds support in the text or history of Section 1519—or in basic common sense.[25]

Petitioner also cites (Br. 23) his own case as an example of the alleged absurdity flowing from the plain

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[25] Petitioner's amicus poses a different set of hypotheticals, arguing that construing Section 1519 to cover physical evidence "could expose companies to significant liability for otherwise run-of-the-mill inventory management" in various circumstances "where the company faces an investigation that is expressly or even tangentially related to its inventory." Chamber of Commerce Amicus Br. 16-17; see Nat'l Fed'n of Indep. Bus. Amicus Br. 5-6 (similar). But Section 1519 neither imposes affirmative inventory-retention requirements nor interferes—in any way—with "run-of-the-mill" inventory management. Rather, it criminalizes only the *knowing* destruction or concealment of records, documents, or physical items with the *intent* "to impede, obstruct, or influence the investigation or proper administration of any matter" within federal jurisdiction. 18 U.S.C. 1519.

meaning of Section 1519. He supports (Br. 23-24) that assertion only by pointing to (1) Section 1519's provision for punishment up to 20 years' imprisonment, and (2) the availability of a different statute, 18 U.S.C. 2232, to prosecute his conduct.

Petitioner is correct that Section 1519's statutory *maximum* punishment is substantial. But sentencing courts have broad discretion to consider the gravity of the particular obstructive conduct at issue in each case. Cf. 2003 Guidelines §§ 2J1.2(c), 2X3.1(a) (linking the advisory Sentencing Guidelines range for certain obstructive conduct to the offense level that would apply to the matter whose investigation was obstructed). Petitioner's modest 30-day sentence—reflecting a downward variance from the applicable Guidelines range—aptly illustrates that district courts are sensitive to the context in which a Section 1519 defendant's obstruction occurs.

Nor is the overlap between Sections 1519 and 2232 a valid reason to conclude that the former does not apply to physical evidence. Section 2232(a) prohibits destroying physical property in order to prevent the government from seizing that property. It does not fully replicate the range of actions covered by Section 1519, which also prohibits "alter[ing]," "falsif[ying]," or "mak[ing] a false entry" in physical evidence. 18 U.S.C. 1519. Nor does Section 2232(a) address concealing evidence to avoid having to produce that evidence without a search or seizure, as Section 1519 does. The partial overlap between the two provisions does not affect the proper interpretation of Section 1519. Different laws often apply to the same underlying conduct, and when an act violates more than one criminal statute, "each [is] fully enforceable on its own

terms." *United States* v. *Batchelder*, 442 U.S. 114, 119, 123-124 (1979).

2. The constitutional avoidance canon does not support petitioner

Petitioner briefly argues (Br. 25-27) that if Section 1519 covers all physical evidence, it might be void for vagueness insofar as it would deprive individuals of "fair notice" of the prohibited conduct and grant excessive discretion to law enforcement officers. He urges (Br. 26-27) this Court to avoid these "serious constitutional questions" by adopting his narrower construction of the statute.

This Court has explained that "[t]he canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction"; in that event, "the canon functions as *a means of choosing between them.*" *Clark* v. *Martinez*, 543 U.S. 371, 385 (2005) (collecting cases). Here, however, petitioner's construction of "any * * * tangible object" to refer only to information-storage devices is at odds with Section 1519's text, structure, purpose, and history. "[T]he meaning of the statute is sufficiently clear that [the Court] need not indulge [petitioner's] cursory nod to constitutional avoidance concerns." *United States* v. *Castleman*, 134 S. Ct. 1405, 1416 (2014).

In any event, petitioner's constitutional objections are unfounded. The Due Process Clause requires that a criminal statute be sufficiently clear to give "the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982).

The "touchstone" of that inquiry "is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *United States* v. *Lanier*, 520 U.S. 259, 267 (1997). Here, the ordinary and natural meaning of the phrase "any * * * tangible object" unambiguously encompasses undersized red grouper. That phrase may be broad, but it is not vague.

Moreover, this Court explained in *Village of Hoffman Estates* that a scienter requirement in a criminal statute "may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." 455 U.S. at 499 & n.14 (collecting cases); see *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 21 (2010). Section 1519 requires not only that the destruction or concealment of evidence be "knowing[]," but also that it be undertaken with the "intent to impede, obstruct, or influence the investigation or proper administration" of a matter within the jurisdiction of the federal government. 18 U.S.C. 1519. The statute does not criminalize innocent or inadvertent conduct. See generally *United States* v. *Moyer*, 674 F.3d 192, 211-212 (3d Cir.), cert. denied, 133 S. Ct. 165 (2012), and 133 S. Ct. 979 (2013); *United States* v. *Yielding*, 657 F.3d 688, 710-715 (8th Cir. 2011), cert. denied, 132 S. Ct. 1777 (2012).

3. Amici's policy objections to Section 1519 are unfounded

Petitioner's amici contend that petitioner's conviction reflects an unwarranted "overcriminalization" of federal law. See, *e.g.*, Crim. Law Professors Amicus Br. 9-18; Cause of Action Amicus Br. 14-20; Nat'l

Ass'n of Crim. Def. Lawyers Amicus Br. 4-12. That objection is both irrelevant and unfounded. Apart from ensuring that Congress "act[s] within any applicable constitutional constraints in defining criminal offenses," this Court does not pass judgment on the wisdom of the scope of criminal law. *Liparota* v. *United States*, 471 U.S. 419, 424 n.6 (1985). Rather, "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of stat[ute]." *Id.* at 424. In any event, it is entirely appropriate for Congress to penalize the intentional destruction of physical evidence for the purpose of thwarting investigations or proceedings under federal authority.

4. The rule of lenity has no application here

Finally, petitioner (Br. 27-28) invokes the rule of lenity to support his narrow construction of Section 1519. But as this Court has repeatedly emphasized, "the rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statutes such that the Court must simply guess as to what Congress intended." *Maracich* v. *Spears*, 133 S. Ct. 2191, 2209 (2013). In this case, "there is no work for the rule of lenity to do." *Ibid.* The text of Section 1519 is unambiguous and leaves no doubt that petitioner's deliberate destruction of evidence to impede a federal investigation came within its reach.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. Title 18 of the United States Code provides in pertinent part:

§ 1503. Influencing or injuring officer or juror generally

(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(b) The punishment for an offense under this section is—

(1) in the case of a killing, the punishment provided in sections 1111 and 1112;

(2) in the case of an attempted killing, or a case in which the offense was committed against a petit juror and in which a class A or B felony was charged, imprisonment for not more than 20 years, a fine under this title, or both; and

(3) in any other case, imprisonment for not more than 10 years, a fine under this title, or both.

* * * * *

§ 1505. Obstruction of proceedings before departments, agencies, and committees

Whoever, with intent to avoid, evade, prevent, or obstruct compliance, in whole or in part, with any civil investigative demand duly and properly made under the Antitrust Civil Process Act, willfully withholds, misrepresents, removes from any place, conceals, covers up, destroys, mutilates, alters, or by other means falsifies any documentary material, answers to written interrogatories, or oral testimony, which is the subject of such demand; or attempts to do so or solicits another to do so; or

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either

House, or any committee of either House or any joint committee of the Congress—

Shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.

* * * * *

§ 1512 [2000]. Tampering with a witness, victim, or an informant

(a)(1) Whoever kills or attempts to kill another person, with intent to—

(A) prevent the attendance or testimony of any person in an official proceeding;

(B) prevent the production of a record, document, or other object, in an official proceeding; or

(C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (2).

(2) The punishment for an offense under this subsection is—

(A) in the case of murder (as defined in section 1111), the death penalty or imprisonment for life, and in the case of any other killing, the punishment provided in section 1112; and

(B) in the case of an attempt, imprisonment for not more than twenty years.

(b) Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than ten years, or both.

(c) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from—

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding;

or attempts to do so, shall be fined under this title or imprisoned not more than one year, or both.

(d) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(e) For the purposes of this section—

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(f) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance—

(1) that the official proceeding before a judge, court, magistrate judge, grand jury, or government agency is before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(g) There is extraterritorial Federal jurisdiction over an offense under this section.

(h) A prosecution under this section or section 1503 may be brought in the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred.

(i) If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

* * * * *

§ 1512 [2000 & Supp. II 2002]. Tampering with a witness, victim, or an informant

(a)(1) Whoever kills or attempts to kill another person, with intent to—

(A) prevent the attendance or testimony of any person in an official proceeding;

(B) prevent the production of a record, document, or other object, in an official proceeding; or

(C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(2) Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to—

(A) influence, delay, or prevent the testimony of any person in an official proceeding;

(B) cause or induce any person to—

(i) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(ii) alter, destroy, mutilate, or conceal an object with intent to impair the integrity or availability of the object for use in an official proceeding;

(iii) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(iv) be absent from an official proceeding to which that person has been summoned by legal process; or

(C) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(3) The punishment for an offense under this subsection is—

(A) in the case of murder (as defined in section 1111), the death penalty or imprisonment for life, and in the case of any other killing, the punishment provided in section 1112;

(B) in the case of—

(i) an attempt to murder; or

(ii) the use or attempted use of physical force against any person;

imprisonment for not more than 20 years; and

(C) in the case of the threat of use of physical force against any person, imprisonment for not more than 10 years.

(b) Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding.

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation[1] supervised release,,[1] parole, or release pending judicial proceedings;

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[1] So in original.

shall be fined under this title or imprisoned not more than ten years, or both.

(c) Whoever corruptly—

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,

shall be fined under this title or imprisoned not more than 20 years, or both.

(d) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from—

(1) attending or testifying in an official proceeding;

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation[1] supervised release,,[1] parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding;

or attempts to do so, shall be fined under this title or imprisoned not more than one year, or both.

(e) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(f) For the purposes of this section—

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

(g) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance—

(1) that the official proceeding before a judge, court, magistrate judge, grand jury, or government agency is before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(h) There is extraterritorial Federal jurisdiction over an offense under this section.

(i) A prosecution under this section or section 1503 may be brought in the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred.

(j) If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(k) Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

* * * * *

§ 1512 [2012]. Tampering with a witness, victim, or an informant

(a)(1) Whoever kills or attempts to kill another person, with intent to—

(A) prevent the attendance or testimony of any person in an official proceeding;

(B) prevent the production of a record, document, or other object, in an official proceeding; or

(C) prevent the communication by any person to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of con-

ditions of probation, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(2) Whoever uses physical force or the threat of physical force against any person, or attempts to do so, with intent to—

(A) influence, delay, or prevent the testimony of any person in an official proceeding;

(B) cause or induce any person to—

(i) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(ii) alter, destroy, mutilate, or conceal an object with intent to impair the integrity or availability of the object for use in an official proceeding;

(iii) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(iv) be absent from an official proceeding to which that person has been summoned by legal process; or

(C) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings;

shall be punished as provided in paragraph (3).

(3) The punishment for an offense under this subsection is—

(A) in the case of a killing, the punishment provided in sections 1111 and 1112;

(B) in the case of—

(i) an attempt to murder; or

(ii) the use or attempted use of physical force against any person;

imprisonment for not more than 30 years; and

(C) in the case of the threat of use of physical force against any person, imprisonment for not more than 20 years.

(b) Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence, delay, or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to—

(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record,

document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation[1] supervised release,,[1] parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than 20 years, or both.

(c) Whoever corruptly—

(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or

(2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,

shall be fined under this title or imprisoned not more than 20 years, or both.

(d) Whoever intentionally harasses another person and thereby hinders, delays, prevents, or dissuades any person from—

(1) attending or testifying in an official proceeding;

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[1] So in original.

(2) reporting to a law enforcement officer or judge of the United States the commission or possible commission of a Federal offense or a violation of conditions of probation[1] supervised release,,[1] parole, or release pending judicial proceedings;

(3) arresting or seeking the arrest of another person in connection with a Federal offense; or

(4) causing a criminal prosecution, or a parole or probation revocation proceeding, to be sought or instituted, or assisting in such prosecution or proceeding;

or attempts to do so, shall be fined under this title or imprisoned not more than 3 years, or both.

(e) In a prosecution for an offense under this section, it is an affirmative defense, as to which the defendant has the burden of proof by a preponderance of the evidence, that the conduct consisted solely of lawful conduct and that the defendant's sole intention was to encourage, induce, or cause the other person to testify truthfully.

(f) For the purposes of this section—

(1) an official proceeding need not be pending or about to be instituted at the time of the offense; and

(2) the testimony, or the record, document, or other object need not be admissible in evidence or free of a claim of privilege.

---

[1] So in original.

(g) In a prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance—

(1) that the official proceeding before a judge, court, magistrate judge, grand jury, or government agency is before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(h) There is extraterritorial Federal jurisdiction over an offense under this section.

(i) A prosecution under this section or section 1503 may be brought in the district in which the official proceeding (whether or not pending or about to be instituted) was intended to be affected or in the district in which the conduct constituting the alleged offense occurred.

(j) If the offense under this section occurs in connection with a trial of a criminal case, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(k) Whoever conspires to commit any offense under this section shall be subject to the same penalties as

those prescribed for the offense the commission of which was the object of the conspiracy.

§ 1513. Retaliating against a witness, victim, or an informant

(a)(1) Whoever kills or attempts to kill another person with intent to retaliate against any person for—

(A) the attendance of a witness or party at an official proceeding, or any testimony given or any record, document, or other object produced by a witness in an official proceeding; or

(B) providing to a law enforcement officer any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings,

shall be punished as provided in paragraph (2).

(2) The punishment for an offense under this subsection is—

(A) in the case of a killing, the punishment provided in sections 1111 and 1112; and

(B) in the case of an attempt, imprisonment for not more than 30 years.

(b) Whoever knowingly engages in any conduct and thereby causes bodily injury to another person or damages the tangible property of another person, or threatens to do so, with intent to retaliate against any person for—

(1) the attendance of a witness or party at an official proceeding, or any testimony given or any record,

document, or other object produced by a witness in an official proceeding; or

(2) any information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, supervised release, parole, or release pending judicial proceedings given by a person to a law enforcement officer;

or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

(c) If the retaliation occurred because of attendance at or testimony in a criminal case, the maximum term of imprisonment which may be imposed for the offense under this section shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(d) There is extraterritorial Federal jurisdiction over an offense under this section.

(e) Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.

(f) Whoever conspires to commit any offense under this section shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

(g) A prosecution under this section may be brought in the district in which the official proceeding (whether pending, about to be instituted, or completed) was intended to be affected, or in which the conduct constituting the alleged offense occurred.

* * * * *

§ 1515. Definitions for certain provisions; general provision

(a) As used in sections 1512 and 1513 of this title and in this section—

(1) the term "official proceeding" means—

(A) a proceeding before a judge or court of the United States, a United States magistrate judge, a bankruptcy judge, a judge of the United States Tax Court, a special trial judge of the Tax Court, a judge of the United States Court of Federal Claims, or a Federal grand jury;

(B) a proceeding before the Congress;

(C) a proceeding before a Federal Government agency which is authorized by law; or

(D) a proceeding involving the business of insurance whose activities affect interstate commerce before any insurance regulatory official or agency or any agent or examiner appointed by such official or agency to examine the affairs of any person engaged in the business of insurance whose activities affect interstate commerce;

(2) the term "physical force" means physical action against another, and includes confinement;

(3) the term "misleading conduct" means—

(A) knowingly making a false statement;

(B) intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading, or intentionally concealing a material fact, and thereby creating a false impression by such statement;

(C) with intent to mislead, knowingly submitting or inviting reliance on a writing or recording that is false, forged, altered, or otherwise lacking in authenticity;

(D) with intent to mislead, knowingly submitting or inviting reliance on a sample, specimen, map, photograph, boundary mark, or other object that is misleading in a material respect; or

(E) knowingly using a trick, scheme, or device with intent to mislead;

(4) the term "law enforcement officer" means an officer or employee of the Federal Government, or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant—

(A) authorized under law to engage in or supervise the prevention, detection, investigation, or prosecution of an offense; or

(B) serving as a probation or pretrial services officer under this title;

(5) the term "bodily injury" means—

(A) a cut, abrasion, bruise, burn, or disfigurement;

(B) physical pain;

(C) illness;

(D) impairment of the function of a bodily member, organ, or mental faculty; or

(E) any other injury to the body, no matter how temporary; and

(6) the term "corruptly persuades" does not include conduct which would be misleading conduct but for a lack of a state of mind.

(b) As used in section 1505, the term "corruptly" means acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.

(c) This chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding.

* * * * *

§ 1519. Destruction, alteration, or falsification of records in Federal investigations and bankruptcy

Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of

any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

* * * * *

§ 2232. Destruction or removal of property to prevent seizure

(a) DESTRUCTION OR REMOVAL OF PROPERTY TO PREVENT SEIZURE.—Whoever, before, during, or after any search for or seizure of property by any person authorized to make such search or seizure, knowingly destroys, damages, wastes, disposes of, transfers, or otherwise takes any action, or knowingly attempts to destroy, damage, waste, dispose of, transfer, or otherwise take any action, for the purpose of preventing or impairing the Government's lawful authority to take such property into its custody or control or to continue holding such property under its lawful custody and control, shall be fined under this title or imprisoned not more than 5 years, or both.

* * * * *

2. Conn. Gen. Stat. Ann. (West 2012) provides in pertinent part:

§ 53a-155. Tampering with or fabricating physical evidence: Class D felony

(a) A person is guilty of tampering with or fabricating physical evidence if, believing that an official proceeding is pending, or about to be instituted, he: (1) Alters, destroys, conceals or removes any record,

document or thing with purpose to impair its verity or availability in such proceeding; or (2) makes, presents or uses any record, document or thing knowing it to be false and with purpose to mislead a public servant who is or may be engaged in such official proceeding.

(b) Tampering with or fabricating physical evidence is a class D felony.

* * * * *

3. D.C. Code (LexisNexis 2001) provides in pertinent part:

§ 22-723. Tampering with physical evidence; penalty.

(a) A person commits the offense of tampering with physical evidence if, knowing or having reason to believe an official proceeding has begun or knowing that an official proceeding is likely to be instituted, that person alters, destroys, mutilates, conceals, or removes a record, document, or other object, with intent to impair its integrity or its availability for use in the official proceeding.

(b) Any person convicted of tampering with physical evidence shall be fined not more than $5,000, imprisoned for not more than 3 years, or both.

* * * * *

4. Fla. Stat. Ann. (West 2006) provides in pertinent part:

§ 918.13. Tampering with or fabricating physical evidence

(1) No person, knowing that a criminal trial or proceeding or an investigation by a duly constituted prosecuting authority, law enforcement agency, grand jury or legislative committee of this state is pending or is about to be instituted, shall:

(a) Alter, destroy, conceal, or remove any record, document, or thing with the purpose to impair its verity or availability in such proceeding or investigation; or

(b) Make, present, or use any record, document, or thing, knowing it to be false.

(2) Any person who violates any provision of this section shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

* * * * *

5. Ind. Code Ann. (LexisNexis 2013) provides in pertinent part:

§ 35-44.1-2-2(3). Offenses involving official proceeding or investigation—Interference with evidence—Juror contact—Penalty [effective July 2, 2014].

(a) A person who:

* * * * *

(3) alters, damages, or removes any record document, or thing, with intent to prevent it from being produced or used as evidence in any official proceeding or investigation.

* * * * *

6. Kan. Stat (2013) provides in pertinent part:

§ 21-5905. Interference with the judicial process.

(a) Interference with the judicial process is:

* * * * *

(5) knowingly or intentionally in any criminal proceeding or investigation:

(A) Inducing a witness or informant to withhold or unreasonably delay in producing any testimony, information, document or thing;

(B) withholding or unreasonably delaying in producing any testimony, information, document or thing after a court orders the produc-

tion of such testimony, information, document or thing;

(C) altering, damaging, removing or destroying any record, document or thing, with the intent to prevent it from being produced or used as evidence; or

(D) making, presenting or using a false record, document or thing with the intent that the record, document or thing, material to such criminal proceeding or investigation, appear in evidence to mislead a justice, judge, magistrate, master or law enforcement officer; or

* * * * *

(b) Interference with the judicial process as defined in:

* * * * *

(4) subsection (a)(5) is a:

(A) Severity level 8, nonperson felony if the matter or case involves a felony; or

(B) class A nonperson misdemeanor if the matter or case involves a misdemeanor;

* * * * *

7. Mass. Ann. Laws (LexisNexis 2010) provides in pertinent part:

Ch. 268, § 13E. Court Proceedings—Alteration or Destruction of Documents and Objects.

* * * * *

(b) Whoever alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the record, document or object's integrity or availability for use in an official proceeding, whether or not the proceeding is pending at that time, shall be punished, by (i) a fine of not more than $10,000, or by imprisonment in the state prison for not more than 5 years, or in a jail or house of correction for not more than 2½ years, or both, or (ii) if the official proceeding involves a violation of a criminal statute, by a fine of not more than $25,000, or by imprisonment in the state prison for not more than 10 years, or in a jail or house of correction for not more than 2½ years, or both.

* * * * *

8. Mo. Ann. Stat. (West 2011) provides in pertinent part:

§ 575.100. Tampering with physical evidence

1. A person commits the crime of tampering with physical evidence if he:

(1) Alters, destroys, suppresses or conceals any record, document or thing with purpose to impair

its verity, legibility or availability in any official proceeding or investigation; or

(2) Makes, presents or uses any record, document or thing knowing it to be false with purpose to mislead a public servant who is or may be engaged in any official proceeding or investigation.

2. Tampering with physical evidence is a class D felony if the actor impairs or obstructs the prosecution or defense of a felony; otherwise, tampering with physical evidence is a class A misdemeanor.

* * * * *

9. Mont. Code Ann. (2013) provides in pertinent part:

§ 45-7-207(1). Tampering with or fabricating physical evidence.

(1) A person commits the offense of tampering with or fabricating physical evidence if, believing that an official proceeding or investigation is pending or about to be instituted, the person:

(a) alters, destroys, conceals, or removes any record, document, or thing with purpose to impair its verity or availability in the proceeding or investigation; or

(b) makes, presents, or uses any record, document, or thing knowing it to be false and with purpose to mislead any person who is or may be engaged in the proceeding or investigation.

* * * * *

10. Nev. Rev. Stat. Ann. (LexisNexis 2012) provides in pertinent part:

§ 199.220. Destroying evidence.

Every person who, with intent to conceal the commission of any felony, or to protect or conceal the identity of any person committing the same, or with intent to delay or hinder the administration of the law or to prevent the production thereof at any time, in any court or before any officer, tribunal, judge or magistrate, shall willfully destroy, alter, erase, obliterate or conceal any book, paper, record, writing, instrument or thing shall be guilty of a gross misdemeanor.

* * * * *

11. N.D. Cent. Code (2012) provides in pertinent part:

§ 12.1-09-03(1). Tampering with physical evidence.

1. A person is guilty of an offense if, believing an official proceeding is pending or about to be instituted, or believing process, demand, or order has been issued or is about to be issued, he alters, destroys, mutilates, conceals, or removes a record, document, or thing with intent to impair its verity or availability in such official proceeding or for the purposes of such process, demand, or order.

* * * * *

12. Ohio Rev. Code Ann. (LexisNexis 2010) provides in pertinent part:

§ 2921.12. Tampering with evidence.

(A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following:

(1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation;

(2) Make, present, or use any record, document, or thing, knowing it to be false and with purpose to mislead a public official who is or may be engaged in such proceeding or investigation, or with purpose to corrupt the outcome of any such proceeding or investigation.

(B) Whoever violates this section is guilty of tampering with evidence, a felony of the third degree.

* * * * *

13. Okla. Stat. Ann. (West 2002) provides in pertinent part:

Tit. 21, § 454. Destroying evidence

Every person who knowing that any book, paper, record, instrument in writing, or other matter or thing, is about to be produced in evidence upon any trial, proceeding, inquiry or investigation whatever, authorized by law, willfully destroys the same, with intent

thereby to prevent the same from being produced, is guilty of a misdemeanor.

* * * * *

14. 18 Pa. Cons. Stat. Ann. (West 1983) provides in *pertinent part:*

§ 4910. Tampering with or fabricating physical evidence

A person commits a misdemeanor of the second degree if, believing that an official proceeding or investigation is pending or about to be instituted, he:

(1) alters, destroys, conceals or removes any record, document or thing with intent to impair its verity or availability in such proceeding or investigation; or

(2) makes, presents or uses any record, document or thing knowing it to be false and with intent to mislead a public servant who is or may be engaged in such proceeding or investigation.

* * * * *

15. Tenn. Code Ann. (2010) provides in pertinent part:

§ 39-16-503. Tampering with or fabricating evidence.—

(a) It is unlawful for any person, knowing that an investigation or official proceeding is pending or in progress, to:

(1) Alter, destroy, or conceal any record, document or thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding; or

(2) Make, present, or use any record, document or thing with knowledge of its falsity and with intent to affect the course or outcome of the investigation or official proceeding.

(b) A violation of this section is a Class C felony.

* * * * *

16. Tex. Penal Code Ann. (West 2013) provides in pertinent part:

§ 37.09. Tampering With or Fabricating Physical Evidence

(a) A person commits an offense if, knowing that an investigation or official proceeding is pending or in progress, he:

(1) alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in the investigation or official proceeding; or

(2) makes, presents, or uses any record, document, or thing with knowledge of its falsity and with intent to affect the course or outcome of the investigation or official proceeding.

(b) This section shall not apply if the record, document, or thing concealed is privileged or is the work

product of the parties to the investigation or official proceeding.

(c) An offense under Subsection (a) or Subsection (d)(1) is a felony of the third degree, unless the thing altered, destroyed, or concealed is a human corpse, in which case the offense is a felony of the second degree. An offense under Subsection (d)(2) is a Class A misdemeanor.

* * * * *

(d) A person commits an offense if the person:

(1) knowing that an offense has been committed, alters, destroys, or conceals any record, document, or thing with intent to impair its verity, legibility, or availability as evidence in any subsequent investigation of or official proceeding related to the offense; or

(2) observes a human corpse under circumstances in which a reasonable person would believe that an offense had been committed, knows or reasonably should know that a law enforcement agency is not aware of the existence of or location of the corpse, and fails to report the existence of and location of the corpse to a law enforcement agency.

(e) In this section, "human corpse" has the meaning assigned by Section 42.08.

17. Utah Code Ann. (LexisNexis 2012) provides in pertinent part:

§ 76-8-510.5. Tampering with evidence—Definitions—Elements—Penalties.

(1) As used in this section:

* * * * *

(b) "Thing or item" includes any document, record book, paper, file, electronic compilation, or other evidence.

(2) A person is guilty of tampering with evidence if, believing that an official proceeding or investigation is pending or about to be instituted, or with the intent to prevent an official proceeding or investigation or to prevent the production of any thing or item which reasonably would be anticipated to be evidence in the official proceeding or investigation, the person knowingly or intentionally:

(a) alters, destroys, conceals, or removes any thing or item with the purpose of impairing the veracity or availability of the thing or item in the proceeding or investigation; or

(b) makes, presents, or uses any thing or item which the person knows to be false with the purpose of deceiving a public servant or any other party who is or may be engaged in the proceeding or investigation.

(3) Subsection (2) does not apply to any offense that amounts to a violation of Section 76-8-306.

(4)(a) Tampering with evidence is a third degree felony if the offense is committed in conjunction with an official proceeding.

(b) Any violation of this section except under Subsection (4)(a) is a class A misdemeanor.

* * * * *

18. Model Penal Code (1962) provides in pertinent part:

§ 241.7. Section 241.7. Tampering With or Fabricating Physical Evidence

A person commits a misdemeanor if, believing that an official proceeding or investigation is pending or about to be instituted, he:

(1) alters, destroys, conceals or removes any record, document or thing with purpose to impair its verity or availability in such proceeding or investigation; or

(2) makes, presents or uses any record, document or thing knowing it to be false and with purpose to mislead a public servant who is or may be engaged in such proceeding or investigation.

* * * * *

19. *Final Report of the National Commission on Reform of Federal Criminal Laws* (1971) provides in pertinent part:

§ 1323. Tampering With Physical Evidence.

(1) Offense. A person is guilty of an offense if, believing an official proceeding is pending or about to be instituted or believing process, demand or order has been issued or is about to be issued, he alters, destroys, mutilates, conceals or removes a record, document or thing with intent to impair its verity or availability in such official proceeding or for the purposes of such process, demand or order.

* * * * *

20. Criminal Justice Codification, Revision and Reform Act of 1973, S. 1, 93d Cong., 1st Sess. (1973) provides in pertinent part:

§ 2-6A1. Definition of Terms

* * * * *

(8) 'object' includes any animate or inanimate thing;

* * * * *

§ 2-6C1. Obstruction of Justice

(a) OFFENSE.—A person is guilty of obstruction of justice if:

(1) he uses force, threat of force, deception, or bribery:

(i) with intent to influence another person's testimony or the production of information or object in an official proceeding; or

(ii) with intent to induce or otherwise cause another person:

(A) to withhold any testimony, information, or object from an official proceeding, whether or not the other person would be legally privileged to do so;

(B) to engage in conduct which, in fact, constitutes a violation of subsection (a)(2);

(C) to elude legal process summoning him to testify or produce information or an object in an official proceeding; or

(D) to absent himself from an official proceeding to which he has been summoned;

(2) with intent to impair the accuracy or availability of information or an object in an official proceeding or for the purposes of process, he alters, destroys, mutilates, conceals, or removes such information or an object;

(3) with intent to hinder, delay, or prevent the communication of information to a law enforcement officer by another person, he deceives such other person or employs force, threat of force, or engages in conduct constituting, in fact, bribery with such other person, or

* * * * *

21. Criminal Code Reform Act of 1973, H.R. 6046, 93d Cong., 1st Sess. (1973) provides in pertinent part:

§ 1325(a). Tampering with Physical Evidence

(a) OFFENSE.—A person is guilty of an offense if he alters, destroys, mutilates, conceals, or removes a record, document, or other object, regardless of its admissibility in evidence, with intent to impair its integrity or availability in an official proceeding.

* * * * *

22. Criminal Code Reform Act of 1973, S. 1400, 93d Cong., 1st Sess. (1973) provides in pertinent part:

§ 1325. Tampering with Physical Evidence

(a) OFFENSE.—A person is guilty of an offense if he alters, destroys, mutilates, conceals, or removes a record, document, or other object, regardless of its admissibility in evidence, with intent to impair its integrity or availability in an official proceeding.

* * * * *

23. Criminal Justice Reform Act of 1975, S. 1, 94th Cong., 1st Sess. (1975) provides in pertinent part:

§ 1325. Tampering with Physical Evidence

(a) OFFENSE.—A person is guilty of an offense if he alters, destroys, mutilates, conceals, or removes a record, document, or other object, with intent to impair its integrity or its availability for use in an official proceeding.

* * * * *

24. Federal Criminal Law Revision and Constitutional Rights Preservation Act of 1976, H.R. 2311, 95th Cong., 1st Sess. (1977) provides in pertinent part:

§ 1325. Tampering with physical evidence

(a) OFFENSE.—A person is guilty of an offense if he alters, destroys, mutilates, conceals, or removes a record, document, or other object, with intent to impair its integrity or its availability for use in an official proceeding.

* * * * *

25. Criminal Code Reform Act of 1977, S. 1437, 95th Cong., 1st Sess. (1977) provides in pertinent part:

§1325. Tampering with Physical Evidence

(a) OFFENSE.—A person is guilty of an offense if he alters, destroys, mutilates, conceals, or removes a record, document, or other object, with intent to impair its integrity or its availability for use in an official proceeding.

* * * * *

26. Criminal Code Reform Act of 1979, S. 1722, 96th Cong., 1st Sess. (1979) provides in pertinent part:

§1325. Tampering With Physical Evidence

(a) OFFENSE.—A person is guilty of an offense if he alters, destroys, mutilates, conceals, or removes a record, document, or other object, with intent to impair its integrity or its availability for use in an official proceeding.

* * * * *

27. Criminal Code Revision Act of 1979, S. 1723, 96th Cong., 1st Sess. (1979) provides in pertinent part:

§ 1725. Tampering with physical evidence

(a) Whoever, with intent to impair the object's integrity or availability for use in an official proceeding that is pending or about to be initiated, knowingly alters, destroys, mutilates, or conceals, a record, document, or other object, or attempts to do so, commits a class E felony.

* * * * *

28. Criminal Code Revision Act of 1980, H.R. 6915, 96th Cong., 2d Sess. (1980) provides in pertinent part:

§1725. Tampering with physical evidence

(a) Whoever, with intent to impair the object's integrity or availability for use in an official proceeding that is pending, knowingly alters, destroys, or mutilates a record, document, or other object, or engages in any act and thereby conceals such an object, or attempts to do so, commits a class E felony.

* * * * *

29. Criminal Code Reform Act of 1981, S. 1630, 97th Cong., 1st Sess. (1981) provides in pertinent part:

§ 1325. Tampering With Physical Evidence

(a) OFFENSE.—A person commits an offense if, knowing an official proceeding is pending or likely to be instituted, he alters, destroys, mutilates, conceals, or removes a record, document, or other object, with intent to impair its integrity or its availability for use in an official proceeding.

* * * * *

30. Criminal Code Revision Act of 1981, H.R. 4711, 97th Cong., 1st Sess. (1981) provides in pertinent part:

§ 1725. Tampering with physical evidence

(a) Whoever, with intent to impair the object's integrity or availability for use in an official proceeding that is pending, knowingly alters, destroys, or mutilates a record, document, or other object, or engages in any act and thereby conceals such an object, or attempts to do so, commits a class E felony.

* * * * *

31. Criminal Code Revision Act of 1981, H.R. 5679, 97th Cong., 2d Sess. (1982) provides in pertinent part:

§ 1725. Tampering with physical evidence

(a) Whoever, with intent to impair the object's integrity or availability for use in an official proceeding that is pending, knowingly alters, destroys, or mutilates a record, document, or other object, or engages in any act and thereby conceals such an object, or attempts to do so, commits a class E felony.

* * * * *

32. Criminal Code Revision Act of 1982, H.R. 5703, 97th Cong., 2d Sess. (1982) provides in pertinent part:

§ 1725. Tampering with physical evidence

(a) Whoever, with intent to impair the object's integrity or availability for use in an official proceeding that is pending, knowingly alters, destroys, or mutilates a record, document, or other object, or engages in any act and thereby conceals such an object, or attempts to do so, commits a class E felony.

* * * * *

REPLY BRIEF

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JOHN L. YATES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

ARGUMENT 1

The Ordinary Or Natural Meaning Of "Tangible Object," In The Context Of 18 U.S.C. § 1519, Is A Thing Used To Preserve Information, Such As A Computer, Server, Or Similar Storage Device 1

A. The ordinary or natural meaning of "tangible object" necessarily depends on its context. 3

B. In the specific context of its surrounding terms, "tangible object" means a thing used to preserve information, like a computer, server, or similar storage device. 5

1. The government's reliance on discovery provisions is misplaced. 11

2. The Model Penal Code and the Brown Commission Report are inapposite 12

3. Section 1512(b) and Section 1519 target different conduct. 13

TABLE OF CONTENTS –*continued*–

Page

C. The broader statutory context in which "tangible object" is placed confirms the phrase's meaning as a thing used to preserve information, akin to a computer, server, or similar storage device.....14

D. The legislative history comports with Mr. Yates's contextual reading of "tangible object" as meaning a thing used to preserve information, akin to a computer, server, or similar storage device.....19

E. Additional rules of statutory construction support Mr. Yates's contextual reading of "tangible object" as a thing used to preserve information, akin to a computer, server, or similar storage device.....24

CONCLUSION 26

TABLE OF AUTHORITIES

Cases **Page(s)**

Bailey v. United States,
516 U.S. 137 (1995) 7

Caraco Pharmaceutical Labs, Ltd. v. Nordisk A/S,
132 S. Ct. 1670 (2012) 4

Christopher v. Smithkline Beecham Corp.,
132 S. Ct. 2156 (2012) 10

Deal v. United States,
508 U.S. 129 (1993) 3

Federal Aviation Administration v. Cooper,
132 S. Ct. 1441 (2012) 4

Freeman v. Quicken Loans, Inc.,
132 S. Ct. 2034 (2012) 6

Johnson v. United States,
559 U.S. 133 (2010) 12-13

Lawson v. FRM LLC,
134 S. Ct. 1158 (2014) 15

Leocal v. Ashcroft,
543 U.S. 1 (2004) 4

Robinson v. Shell Oil Co.,
519 U.S. 337 (1997) 6

TABLE OF AUTHORITIES –*continued*–

Page(s)

Russello v. United States,
464 U.S. 16 (1983) 9

United States v. Arthur Andersen LLP,
No. 02-121, 2002 WL 32153945
(S.D. Tex. Mar. 14, 2002) 20

Wachovia Bank v. Schmidt,
546 U.S. 303 (2006) 11

Statutes

15 U.S.C. § 78jjj 9-10

18 U.S.C. § 152 9-10

18 U.S.C. § 1501 *et seq.* ..... *passim*

18 U.S.C. § 1505 8

18 U.S.C. § 1512 ..... *passim*

18 U.S.C. § 1519 ..... *passim*

18 U.S.C. § 1520 15-16

18 U.S.C. § 1712 9

18 U.S.C. § 2232 18-19

29 U.S.C. § 439 9

TABLE OF AUTHORITIES –*continued*–

Page(s)

49 U.S.C. § 522 9

49 U.S.C. § 11903 9

49 U.S.C. § 16102 9

49 U.S.C. § 21311 9

Sarbanes-Oxley Act of 2002, 116 Stat. 745 (2002) ..... *passim*

U.S. Sentencing Guidelines Manual

U.S. Sentencing Guidelines Manual § 2J1.2 (2003) 10

Miscellaneous

Model Penal Code § 241.7 12

Final Report of the National Commission on Reform of Federal Criminal Laws (1971) 12

S. Rep. No. 107-146 (2002) 21-24

ARGUMENT

THE ORDINARY OR NATURAL MEANING OF "TANGIBLE OBJECT," IN THE CONTEXT OF 18 U.S.C. § 1519, IS A THING USED TO PRESERVE INFORMATION, SUCH AS A COMPUTER, SERVER, OR SIMILAR STORAGE DEVICE.

Context is the key to the meaning of the undefined statutory phrase "tangible object" as it is used in 18 U.S.C. § 1519, commonly known as the anti-shredding provision of the Sarbanes-Oxley Act of 2002. Section 1519 was enacted in response to the Enron document-shredding scandal, which included destroying paper records, computer drives, and email systems. In Section 1519, "tangible object" is listed with "record" and "document," immediately following the verb phrases "alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in." In this context, "tangible object" naturally means a thing used to preserve information, such as a computer, server, or similar storage device. *See* Pet. Br. 10-22.

In urging the Court to reject this contextual meaning, the government claims that the dictionary definitions of the words "tangible" and "object" reflect the plain meaning of the phrase "tangible object." *See* Resp. Br. 10, 15. The government, however, implicitly recognizes that the phrase "tangible object" has different meanings in different contexts. For example, the government repeatedly proposes construing "tangible object" as "all physical evidence," despite the absence of "evidence" in the dictionary definitions of "tangible" and "object." *See* Resp. Br. 11, 14, 17.

Moreover, the government's proposed constructions are not based on the actual context in which "tangible object" is used. Rather, the government seeks to import the term "evidence" into the meaning of "tangible object" here based on different language that appears in different provisions in different contexts. *See* Resp. Br. 16-29. The specific context in which "tangible object" appears, however, makes Section 1519 unique among those provisions. The different language demonstrates that for purposes of Section 1519, "tangible object" has a different meaning than the terms in those provisions.

Regarding the statutory context in which Section 1519 is placed, the government asserts that construing "'tangible object' to encompass all physical evidence" comports with the general structure and purpose of Section 1519 and Chapter 73 of Title 18 of the United States Code, entitled "Obstruction of Justice." Resp. Br. 17. That assertion, however, does not comport with the specific purpose of Section 1519, or with its specific placement in Chapter 73 and in the Sarbanes-Oxley Act. The actual structure, placement, and purpose of Section 1519 support reading "tangible object" as a thing used to preserve information, such as a computer, server, or similar storage device. This reading fits within the framework of both Chapter 73 and the Sarbanes-Oxley Act.

The government also attempts to bolster its construction of "tangible object" by citing to isolated portions of the legislative history of Section 1519. *See* Resp. Br. 29-35. When viewed in context, however, the legislative history as a whole, including the

origins of Section 1519 in the wake of the Enron document-shredding scandal, reinforces reading "tangible object" in Section 1519 as meaning a thing used to preserve information, akin to a computer, server, or similar storage device.

The overarching flaw in the government's position is that it misconstrues the fundamental principle of statutory construction that the meaning of a statutory phrase "must be drawn from the context *in which it is used*." *Deal v. United States*, 508 U.S. 129, 132 (1993) (emphasis added); *see also* Pet. Br. 15. This Court's principles of statutory construction support the contextual meaning of "tangible object" as a thing that is used to preserve information, such as a computer, server, or similar storage device. A fish is not such a thing. Mr. Yates therefore asks the Court to reverse the decision of the court below.

A. The ordinary or natural meaning of "tangible object" necessarily depends on its context.

The government asserts that the phrase "tangible object" "ordinarily means the same thing" as the dictionary definitions of "tangible" and "object"–that is, "any discrete item or thing that is capable of being touched or otherwise perceived by the senses." Resp. Br. 36; *see also* Resp. Br. 15-16. Yet despite this assertion, the government proposes several constructions of "tangible object" that are not found in the dictionary.[1] More importantly, none of the

[1] The government's brief repeatedly asserts that "tangible object" means all types of "physical evidence." *See, e.g.*, Resp. Br. 10-11, 13-14, 17, 19, 30, 32-33. It also characterizes "tangible object" as: all "physical items," Resp. Br. 14-16, 28; "a physical

government's proposed constructions reflect the context of Section 1519.

Moreover, the government does not dispute that the ordinary meaning of "tangible object" may include a particular category of things in one context (e.g., Apple products in connection with what Apple sells), and a different category of things in another context (e.g., automobile products in connection with what General Motors sells). *See* Pet. Br. 13-14; Resp. Br. 36 n.16. Indeed, the government concedes that "Petitioner may be right (Br. 14) that a person who says 'Apple sells tangible objects' is probably referring to electronic devices." Resp. Br. 36 n.16.

The government attempts to explain away its concession by asserting that it "is only because those are the tangible objects for which Apple is best known—not because there is some specialized understanding of that term that applies *only* to such devices." Resp. Br. 36 n.16. That assertion, however, proves the point that in everyday, ordinary usage, the phrase "tangible object" is ordinarily understood to refer to a *particular* category of things, depending on the particular context in which the phrase is used.[2]

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item with evidentiary significance," Resp. Br. 14; and "any physical object," Resp. Br. 25.

[2] *See Federal Aviation Administration v. Cooper*, 132 S. Ct. 1441, 1450 (2012); *Caraco Pharmaceutical Labs, Ltd. v. Nordisk A/S*, 132 S. Ct. 1670, 1681 (2012); *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004).

B. In the specific context of its surrounding terms, "tangible object" means a thing used to preserve information, like a computer, server, or similar storage device.

In the specific context of Section 1519, "tangible object" is enumerated in a list of three nouns–"record, document, or tangible object"–and is preceded by a list of verb phrases–"alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in." 18 U.S.C. § 1519. These surrounding nouns and verbs support Mr. Yates's argument that "tangible object," as used in Section 1519, is naturally understood as referring to physical things akin to a record or document–that is, things that preserve information, like a computer, server, or similar storage device, which can be altered, destroyed, mutilated, concealed, covered up, falsified, or in which a false entry can be made. *See* Pet. Br. 17-19.

Rather than reading "tangible object" in the context in which it is used, the government dismisses the relevance of the surrounding words in Section 1519 based on its insistence that dictionary definitions establish the ordinary meaning of "tangible object." *See* Resp. Br. 37-38. But as noted above, the government's argument is inherently contradictory, given that the government proposes a construction of the phrase that is not found in the dictionary. *See supra* page 3 and note 1.

This Court's precedent also refutes the government's claim that because the meaning of the phrase "contains little ambiguity," the surrounding words are irrelevant. Resp. Br. 38 (internal quotation

marks omitted). The specific context in which a phrase is used must be considered when determining whether the phrase is plain or ambiguous. *See, e.g.*, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."). The government's claim that the meaning of "tangible object" is unambiguous ignores its surrounding context in Section 1519 and therefore must be rejected.[3]

The government's reluctance to consider the surrounding terms and apply the contextual canons is understandable given that those terms and canons negate its claim that "tangible object" means "evidence." Significantly, the government does not dispute that in Section 1519, "tangible object" is "a general term at the end of a list of more specific references," i.e., "record" and "document." Resp. Br. 40 n.18. Nor does the government deny that the "*ejusdem generis* canon counsels that, where general words follow an enumeration of specific terms, the general words may be read to embrace only other items similar to those expressly enumerated." Resp. Br. 37. Further, the government concedes that "petitioner is correct (Br. 18) that records and documents are both means of 'preserving information.'" Resp. Br. 39. It follows from the

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[3] The modifier "any," *see* Resp. 15-16, adds nothing to the analysis because the meaning of "tangible object" must first be established. *See Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2042 (2012).

contextual canons that "tangible object" shares this common meaning regarding preserving information.

The government attempts to rebut this logical conclusion based on a *presumption* that–"[t]he destruction of an information-storage device *presumably* entails the destruction of the records or documents it contains" thereby rendering the phrase "tangible object" superfluous. Resp. Br. 38 (emphasis added). That presumption, however, is unfounded. For example, a person could destroy a blank hard drive, mistakenly believing it contains incriminating information. That person would fall within the scope of Section 1519, even though no record or document was destroyed.

The government also attempts to avoid the specific common attribute that records and documents share–preserving information–by positing another common attribute of records and documents–providing information. Resp. Br. 39. But that attribute is generally applicable to anything because everything provides some kind of information. Had Congress intended to target anything and everything, there would be no reason to list records and documents.

The government concedes that its construction of "tangible object" would render "record" and "document" superfluous. Resp. Br. 40 n.18. Words in a statute should not be so readily discarded, especially where, as here, there is a viable alternative interpretation that maintains meaning for every word of the statute. *See, e.g., Bailey v. United States*, 516 U.S. 137,145 (1995).

Expanding the scope of the contextual inquiry to the surrounding verbs–in particular, "makes a false entry in"–further supports construing "tangible object" in Section 1519 as a thing used to preserve information, such as a computer, server, or similar storage device. Congress's use of that verb phrase makes sense if "tangible object" is read as a device for storing information, akin to records and documents. But the verb phrase cannot be reconciled with the government's construction of "tangible object" as any type of physical evidence, including a fish. *See* Pet. Br. 17.

Rather than attempting to reconcile its construction of "tangible object" with the verb phrases in Section 1519, the government points to 18 U.S.C. § 1505 as its single example of a statute in which a verb phrase does not apply to a noun. *See* Resp. Br. 42. The government argues that because all of Section 1505's verb phrases–"conceals, covers up, destroys, mutilates, alters"–do not apply to "oral testimony," Section 1519's verb phrase "makes a false entry in" need not apply to "tangible object." *See* Resp. Br. 42-43 (internal quotation marks omitted).

Unlike Section 1519, however, the awkward syntax of Section 1505 was not part of the original statute. Rather, the oral testimony language was added in an amendment years after Section 1505 was originally drafted. *See* Resp. Br. 42-43 (citing Hart-Scott-Rodino Antitrust Improvements Act of 1976, 90 Stat. 1384, 1389). It makes sense, then, that some of Section 1505's verbs might not apply to the later-added oral testimony language.

The verb phrases in Section 1519, however, were drafted simultaneously with the nouns. It makes little sense to conclude that Congress simultaneously wrote specific nouns and verbs into Section 1519, but did not intend for those nouns and verbs to apply together.

Furthermore, Section 1519 is the sole provision in Chapter 73 that includes the verb phrases "covers up, falsifies, or makes a false entry in." *See* 18 U.S.C. § 1501, *et seq.* In fact, the verb phrase "makes a false entry in" is only found in record-keeping statutes.[4] Congress's decision to include that verb phrase in Section 1519–and its decision to exclude it in other parts of Chapter 73 and the Sarbanes-Oxley Act–reflects a deliberate choice to liken Section 1519's scope to the record-keeping context. *See Russello v. United States*, 464 U.S. 16, 23 (1983).

The government nonetheless argues that the proper grammatical reading of Section 1519 "leads to the untenable conclusion that most *documents* are also outside of Section 1519's scope," because "[o]ne does not make 'entr[ies]' in many types of documents that are relevant even in white-collar fraud cases–for example, letters, emails, and contracts." Resp. Br. 43. That assertion is meritless. Entries can be made in letters, emails, and contracts.[5]

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[4] *See, e.g.*, 15 U.S.C. § 78jjj; 18 U.S.C. § 152; 18 U.S.C. § 1712; 29 U.S.C. § 439; 49 U.S.C. § 522; 49 U.S.C. § 11903; 49 U.S.C. § 16102; 49 U.S.C. § 21311.

[5] Likewise, if a person installs a program on a computer so that the computer produces false data, it would be perfectly natural to speak of that person as having falsified a computer or hard drive. *See* Resp. Br. 43 n.19.

Moreover, other record-keeping statutes use the verb phrase "makes a false entry in" with reference to documents. *See, e.g.*, 15 U.S.C. § 78jjj ("makes a false entry in, or otherwise falsifies any document affecting or relating to the property or affairs of a debtor"); 18 U.S.C. § 152 ("makes a false entry in any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor").

The government cannot point to a single substantive criminal statute–federal or state–that uses the phrase "tangible object" in a similar context as Section 1519, i.e., where the phrase "tangible object" is preceded by the nouns "record" and "document," and is governed by the verb phrases "covers up, falsifies, or makes a false entry in." The government thus attempts to draw a parallel between Section 1519's language–"record, document, or tangible object"–and "other provisions using virtually identical" or "materially indistinguishable" language. Resp. Br. 19, 25.[6] But when that language is viewed in context, it is clear that the government's repeated references to "virtually identical" language are just nuanced ways of saying "different" language.

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[6] *But see* Pet. Br. 22; U.S. Sentencing Guidelines Manual § 2J1.2 cmt. n.1 (2003) (providing an illustrative list of "records, documents, or tangible objects" as things "that are stored on, or that are, magnetic, optical, digital, other electronic, or other storage mediums or devices"); *Christopher v. Smithkline Beecham Corp.*, 132 S. Ct. 2156, 2170 (2012).

1. The government's reliance on discovery provisions is misplaced.

The government argues that a broad construction of "tangible object" for purposes of Section 1519 would be consistent with the broad construction given the phrases "tangible object" and "tangible thing" in various provisions relating to discovery. Resp. Br. 16-17. Again, the government's argument lacks the critical component of context. *See Wachovia Bank v. Schmidt*, 546 U.S. 303, 318 (2006) (distinguishing between the use of the same word in the venue context and the subject-matter-jurisdiction context).

In the context of the discovery rules, "tangible object" is enumerated in a broad list of other physical items. *See* Resp. Br. 16 nn.3, 4.[7] "When an enumerated list of items spans everything from books and buildings to papers and places, it is clear that the statute encompasses any potential evidence that might be relevant to the government's case against a defendant or relevant to a defense." Cato Amicus Br. 13. Clearly, the list of items that includes "tangible object" in Section 1519 is not as expansive as the lists in the discovery provisions. On the contrary, in Section 1519, "tangible object" is listed only with "record" and "document."

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[7] All of the statutes and rules referenced in footnotes three and four of the government's brief are discovery provisions.

2. The Model Penal Code and the Brown Commission Report are inapposite.

Notwithstanding the very clear historical backdrop of the Sarbanes-Oxley Act, the government makes the astonishing claim that Section 1519's origins stem from "a decades-long effort to expressly prohibit the destruction of physical evidence with obstructive intent." Resp. Br. 19. The government, however, can point to nothing to support this claim. Indeed, the legislative history of the Sarbanes-Oxley Act of 2002 is devoid of any reference to the numerous failed reform proposals from the 1970s and 1980s that "would have criminalized" tampering with physical evidence, such as the Model Penal Code (MPC) § 241.7 or *Final Report of the National Commission on Reform of Federal Criminal Laws* (1971) (Brown Commission Report) Section 1323. Resp. Br. 23.

The lack of any connection between Section 1519 and the MPC and Brown Commission Report is highlighted by the different language and different penalties in those provisions. Unlike Section 1519, the MPC and the Brown Commission Report do not use the phrase "tangible object" or "makes a false entry in." And unlike the MPC and the Brown Commission Report, Section 1519 does not require a connection to an official proceeding.

Moreover, unlike the twenty-year felony prohibited in Section 1519, the offenses in the MPC and the Brown Commission Report are misdemeanors that were never enacted into law. *See Johnson v. United States*, 559 U.S. 133, 141 (2010)

("It is significant, moreover, that the meaning of 'physical force' the Government would seek to import into this definition of 'violent felony' is a meaning derived from a common-law misdemeanor.").

In short, the government's rather lengthy discussion of those provisions is inapposite as to the meaning of "tangible object" here.[8]

3. Section 1512(b) and Section 1519 target different conduct.

Context is also absent from the government's efforts to bind the phrase "any record, document, or tangible object" in Section 1519 to the "virtually identical references to 'record, document, or other object'" in Section 1512(b). *See* Resp. Br. 28. As Representative Oxley explains, although Congress used Section 1512(b)(2)(B) as the *starting point* in drafting the anti-shredding provision, Congress made "five key modifications" to the text of Section 1519. *See* Oxley Amicus Br. 11. Not only did Congress use the phrase "tangible object" in Section 1519 instead of Section 1512(b)'s phrase "other object," it also deviated from Section 1512(b) by expanding Section 1519's temporal scope; by substituting "any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11" for "official proceeding"; by adding the terms "covers up, falsifies, or makes a false entry in" to the list of verbs found in Section 1512(b)(2)(B); and by imposing liability on the person who actually shreds the documents. *Id.* 11-14 These strong textual *differences*

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[8] The state provisions, *see* Resp. Br. 21 n.6, also use different language and are inapposite.

between Section 1519 and Section 1512(b)(2)(B) show that the two statutes criminalize different subject matter.

C. The broader statutory context in which "tangible object" is placed confirms the phrase's meaning as a thing used to preserve information, akin to a computer, server, or similar storage device.

Reading "tangible object" in the context of its placement in the Sarbanes-Oxley Act and the "obstruction-of-justice" chapter of Title 18, Chapter 73, reinforces the conclusion that the phrase means a thing used to preserve information, like a computer, server, or similar storage device. *See* Pet. Br. 19-22. The government's claim that reading "tangible object" as "evidence" also "makes sense in light of the structure and overarching purpose of both Chapter 73 and Section 1519," Resp. Br. 17, fails to take into account the full context of the statutory scheme under the Sarbanes-Oxley Act and Chapter 73.

For example, the government claims that Chapter 73 and Section 1519 share the objective of "protect[ing] the integrity of government operations, promot[ing] fairness to all parties in official proceedings, and ensur[ing] that government determinations of factual matters are accurate and true." Resp. Br. 18. Tellingly, the government cites no authority for this claim. Nor could it. In addition to the fact that the plain text of Section 1519 makes no reference to an "official proceeding," this Court has already recognized that the purpose of the Sarbanes-Oxley Act is to "prevent and punish corporate and

criminal fraud, protect the victims of such fraud, preserve evidence of such fraud, and hold wrongdoers accountable for their actions." *Lawson v. FRM LLC*, 134 S. Ct. 1158, 1162 (2014) (quoting S. Rep. No. 107-146, 2 (2002)); *see also id.* at 1161 ("To safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation, Congress enacted the Sarbanes-Oxley Act of 2002, 116 Stat. 745.").

Moreover, the government's argument is based on the erroneous assumption that because Section 1519 is located in Chapter 73, entitled "obstruction-of-justice," Section 1519 must be read as prohibiting obstructive acts in all contexts. The structure of Chapter 73, however, refutes that assumption. Indeed, several provisions immediately preceding Section 1519 in Chapter 73 address obstructive acts in specific contexts, including federal audits, examinations of financial institutions, inquiries into health care-related offenses, and bankruptcy investigations. Oxley Amicus Br. 23-24. Furthermore, the statute immediately after Section 1519 was its "sister" provision in the Sarbanes-Oxley Act, and it targets obstruction involving the destruction of corporate audit records. *See* 18 U.S.C. § 1520. As Representative Oxley explains:

> These sister provisions are closely intertwined. Section 1520 requires that corporate audit records be retained for five years, while Section 1519 prohibits the destruction of business records in contemplation of a federal investigation or proceeding. Together, they establish a comprehensive regulatory regime for

> preservation of corporate records: those most likely to be relevant in cases of corporate fraud (i.e., audit records) are retained for a set period of time, which may be extended and broadened to include additional records when an investigation is contemplated.

Oxley Amicus Br. 9.

Reading Section 1519 and Section 1520 together clarifies that Congress intended the two statutes to target the destruction of records, documents, and the like, a point reinforced by the use of the word "document" in the relevant public law section of the Sarbanes-Oxley Act, and the use of the word "record" in the titles of both Section 1519 and Section 1520. *See* Oxley Amicus Br. 10.[9]

Rather than addressing Section 1520, the government's argument focuses on Section 1512(c), which is another "obstruction-of-justice" provision that was enacted as part of the Sarbanes-Oxley Act. But unlike Sections 1519 and 1520, which were placed in Title VII of the Act, under the section titled "Criminal penalties for altering documents," Section 1512(c) was placed in Title XI, under section 1102,

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[9] The government posits that the title of a statute cannot limit the plain meaning of its text. *See* Resp. Br. 40-41. But the meaning of "tangible object" is informed by its placement within the context of the anti-shredding provision and the Sarbanes-Oxley Act as a whole–a point that the government never acknowledges. The anti-shredding provision's title does not limit its plain text; it simply illuminates the plain meaning of "tangible object" in context.

entitled "Tampering with a record or *otherwise impeding an official proceeding.*"

Nonetheless, the government asserts that because Sections 1512(c) and 1519 were enacted at the same time, and the phrase "other object" in Section 1512(c) encompasses "any kind of object," the phrase "tangible object" in Section 1519 should cover the same thing. Resp. Br. 48. Far from supporting the government's argument, however, the *in pari materia* doctrine is fatal to its argument, *see* Resp. Br. 29, because Section 1519 uses one phrase, "tangible object," and Section 1512(c) uses a different phrase, "other object," indicating the phrases have different meanings.

Moreover, by their very terms, the two provisions serve different functions and thus address different conduct. Section 1512(c)(1) targets the destruction of a "record, document, or other object," when a person acts "corruptly . . . with the intent to impair the object's integrity or availability for use in an official proceeding." Section 1519, on the other hand, targets the knowing destruction of a "record, document, or tangible object, with the intent to impede, obstruct, or influence the investigation or proper administration of" any federal matter.[10]

The government attempts to minimize the significance of the different language in the two provisions by asserting, "[b]ecause Section 1519 was drafted well before Section 1512(c)–and by different

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[10] Likewise, the fact that the two provisions require different mental states indicates that the two provisions criminalize different conduct.

people–the legislative record refutes any assumption that the overlap reflects an intentional scheme in which each provision serves a unique and distinct function." Resp. Br. 49-50. The simple fact, however, is that both provisions were passed as part of the Sarbanes-Oxley Act, in separate sections, and with separate language. Nothing in the legislative history justifies overlooking these facts or reading the two sections, which use different language, as covering the exact same conduct. As Representative Oxley explains, reading Section 1519 and Section 1512(c) as covering the same conduct would render Section 1512(c) wholly superfluous. *See* Oxley Amicus Br. 20-21.

In the government's view, reading "tangible object" as a thing like a record or document that is used to preserve information, e.g., a computer, server, or similar storage device, creates an "arbitrary distinction between documentary evidence and most kinds of physical evidence." Resp. Br. 47. But there is nothing arbitrary about the fact that Congress created different statutes, with different standards, to target different acts of obstruction.

Consider the government's claim that it makes little sense as a policy matter that "Section 1519 prohibits a murderer from destroying a threatening letter to his victim (a 'document')–but not the murder weapon, his victim's body, or the getaway car." Resp. Br. 47. A murderer, however, could be charged with destroying such evidence under other criminal provisions. For example, 18 U.S.C. § 2232 imposes liability if property that the government has the lawful authority to seize is destroyed, and Section 1512(c) criminalizes obstructive conduct related to an

official proceeding. It makes sense, then, that those provisions broadly prohibit the destruction of evidence that would be relevant to an official proceeding or which the government would have the authority to seize.[11]

The heart of Section 1519, however, is the "*intent* to impede, obstruct, or influence," the "proper administration of any matter within" federal jurisdiction. Documentary information, by its very nature, is critical to the administration of any federal matter (i.e., in the form of regulatory filings and white-collar fraud investigations); whereas, "all physical evidence" is not. It makes little sense, then, to conclude that Congress intended in Section 1519 to prohibit the destruction of "all physical evidence" when it could accomplish the goal of ensuring the proper administration of federal matters by limiting Section 1519's reach to documentary information.

D. The legislative history comports with Mr. Yates's contextual reading of "tangible object" as meaning a thing used to preserve information, akin to a computer, server, or similar storage device.

The government recognizes that the "main impetus" for the Sarbanes-Oxley Act and its anti-shredding provision "was prompted by revelations

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[11] Additionally, the government's example ignores Section 1519's verbs. One does not speak in terms of altering, falsifying, or making a false entry in a murder weapon. On the other hand, the verbs in Section 2232–"damages, wastes, disposes of, transfers"–could apply to a murder weapon.

that Enron and its outside accounting firm–Arthur Andersen LLP–had deliberately destroyed large quantities of *documents* in an effort to conceal fraudulent accounting practices." Resp. Br. 4, 30 (emphasis added). "No one disputes that Enron's collapse sparked the Sarbanes-Oxley Act, or that Section 1519 was intended to prohibit corporate *document* shredding to hide evidence of financial wrongdoing." Resp. Br. 46 (emphasis added). Curiously, however, the government never acknowledges that Enron and Arthur Andersen's purge extended beyond paper records and documents to computer drives and the email system. *See United States v. Arthur Andersen LLP*, No. 02-121, 2002 WL 32153945, ¶¶ 5, 9-11 (S.D. Tex. Mar. 14, 2002).

In light of Section 1519's origins as part of the Sarbanes-Oxley Act, which clearly targeted the destruction of corporate records, documents, computer drives, and email servers, an ordinary person would naturally understand the phrase "tangible object" in Section 1519–entitled "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy"–to mean a thing used to preserve information, like records and documents, including a computer, server, or similar storage device. The government attempts to avoid this important context by asserting that Section 1519's origins in the Sarbanes-Oxley Act do not trump its plain meaning. Resp. Br. 46. Yet again, this assertion fails because, as the government implicitly acknowledges, the meaning of "tangible object" depends on its context, which includes its historical origins.

However, in urging the Court to construe Section 1519 like Section 1512(b)–as broadly relating to physical evidence–the government mischaracterizes the historical origins of Section 1519. The government alleges, "All agree that the Judiciary Committee intended Section 1519 to address Section 1512(b)'s loophole and remedy the absence of a direct prohibition on destroying evidence." Resp. Br. 34 (citing Oxley Amicus Br. 11-14; Crim. Law Professors Amicus Br. 32; Cause of Action Amicus Br. 4, 7-8). This allegation is simply wrong. No one agrees that Congress intended Section 1519 to "remedy the absence of a *direct* prohibition on destroying *evidence*." Resp. Br. 34 (emphasis added).

The Senate Report is straightforward. The "loopholes" Congress targeted were *not* based on evidence in general. Congress specifically identified two major loopholes in then-existing obstruction-of-justice statutes related to records and documents. First, "Section 1512(b) 'ma[d]e it a crime to persuade another person to destroy *documents*, but not a crime for a person to destroy the same *documents* personally'"; and second, "Section 1503 had been 'narrowly interpreted by courts * * * to apply only to situations when the obstruction of justice may be closely tied to a judicial proceeding.'" Resp. Br. 30-31 (quoting S. Rep. No. 107-146, 6-7 (2002)) (emphasis added).

This plain text contradicts the government's claim that the only way Section 1519 could close those loopholes would be "if its reference to 'any record, document, or tangible object' covers all of the 'object[s]' also encompassed by Section 1512(b)(2). Otherwise the loophole survives with respect to

physical evidence that would not qualify as a 'record, document, or tangible object' under a narrower construction of that term." Resp. Br. 34.

The loopholes identified by the Judiciary Committee plainly relate to the destruction of records and documents in connection with an official proceeding. Moreover, the text of Section 1519 reveals that it addresses both of the loopholes. First, "Congress excised the requirement, found in Section 1512(b)(2)(B), that to violate the provision one must intimidate, threaten, or persuade another person to destroy the records." Oxley Amicus Br. 13. Second, Congress "substitut[ed] 'official proceeding' with 'any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11.'" Oxley Amicus Br. 12.

Furthermore, the government's discussion of the legislative history selectively cites to isolated parts of the history, taken out of context, while omitting the parts that cut against its argument. For example, the government cites to the portion of the Senate Report that states that "'Section 1519 is meant to apply broadly to *any acts to destroy or fabricate physical evidence.*'" Resp. Br. 32 (quoting S. Rep. No. 107-146, 12 (2002)). The government, however, neglects to mention that the very same paragraph of that Senate Report contains the following language:

> Destroying or falsifying *documents* to obstruct any of these types of matters or investigations, which in fact are proved to be within the jurisdiction of any federal agency are covered by this statute.

> ***
>
> The intent of the provision is simple; people should not be destroying, altering, or falsifying *documents* to obstruct any government function.
>
> ***
>
> [T]his section could also be used to prosecute a person who actually destroys the *records* himself in addition to one who persuades another to do so, ending yet another technical distinction which burdens successful prosecution of wrongdoers.

S. Rep. No. 107-146, 12 (emphasis added).

Likewise, for each of the isolated statements of Senators cited by the government, the legislative history is replete with statements by other Senators indicating their belief "that Section 1519 was specifically intended to reach persons who destroy documents themselves, and not only those who instruct others do so." *See* Oxley Amicus Br. 10, 16 (citing and expounding on statements of Senators).

The government complains that there is not a "single instance in which anyone ever stated that Section 1519 covered *only*" offenses involving the "destruction of documents." Resp. Br. 48. On the contrary, the legislative history quite clearly refers to Section 1519 as a "general anti shredding provision" and as "an obstruction statute specifically directed to

the destruction of documents." S. Rep. No. 107-146, 21, 27.

The government also claims that the Senate Report "did not suggest that Section 1519's reference to 'any record, document, or tangible object' encompassed only a subset of physical items." Resp. Br. 32. In fact, the "Senate Report's distinction between, on the one hand, 'paper records' and, on the other, 'computer hard drives and E-mail system[s]' confirms the interpretation of 'tangible objects' as a reference to the ever-expanding universe of devices that store electronic records." Chamber of Commerce Amicus Br. 14.

E. Additional rules of statutory construction support Mr. Yates's contextual reading of "tangible object" as a thing used to preserve information, akin to a computer, server, or similar storage device.

The examples provided in the briefs of Mr. Yates and the amici demonstrate that the government's broad, non-contextual reading of "tangible object" would bring a whole host of innocent remedial measures or otherwise run-of-the-mill inventory management situations within the purview of the anti-shredding provision. *See* Pet. Br. 23; Chamber Commerce Amicus Br. 15-17; NFIB Amicus Br. 22-29. The government does not address those particular examples; it reinvents them, and then claims that "it is not absurd to prohibit the destruction of evidence to impede the investigation or administration of

matters under federal authority." Resp. Br. 50.[12] That claim, however, misses the point–that is, Section 1519 does not target the destruction of all types of evidence.

Mr. Yates and the amici also pointed to the instant case as an absurd result of reading "tangible object" out of context. Pet. Br. 24; Chamber of Commerce Amicus Br. 12; NACDL Amicus Br. 9-12. The government concedes that "Section 1519's statutory maximum punishment is substantial," Resp. Br. 52, but nevertheless seeks to minimize the potential penalties by asserting that sentencing courts have broad discretion to consider the gravity of the particular obstructive conduct at issue in each case.

That sentencing courts have broad sentencing discretion overlooks the reality that "even when a person receives a relatively light prison sentence under Section 1519 for destroying evidence of a non-criminal offense, [the person] still must deal with the harsh implications of being a convicted felon." *See* Cause of Action Amicus Br. 20. The government also ignores the fact that an "obstruction indictment is enough to call into question the future—and certainly the reputation—of any" business or organization. NFIB Amicus Br. 21.

Finally, if any doubt remains as to the meaning of "tangible object," that doubt must be resolved in Mr. Yates's favor based on the doctrine of constitutional

---

[12] For instance, the government mischaracterizes Mr. Yates's example of an automaker who *voluntarily* recalls auto parts. *Compare* Pet. Br. 23, *with* Resp. Br. 51.

avoidance and the rule of lenity. *See* Pet. Br. 25-28; *see also* Law Professors Amicus Br. 18-22, 33-35.

CONCLUSION

The judgment of the United States Court of Appeals for the Eleventh Circuit should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

JOHN L. YATES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTION PRESENTED

Did the Eleventh Circuit go overboard when it interpreted Section 1519, a provision of the Sarbanes-Oxley Act that forbids the destruction of "any record, document, or tangible object," to criminalize the throwing of undersized fish into the Gulf of Mexico?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF *AMICUS CURIAE*	1
INTRODUCTION AND SUMMARY OF THE ARGUMENT	1
ARGUMENT	5
I. THE TEXT OF SECTION 1519 ITSELF INDICATES CONGRESSIONAL INTENT TO PROHIBIT DESTRUCTION OF RECORDS AND RECORD-KEEPING DEVICES	7
A. The Eleventh Circuit Failed To Apply Statutory Interpretation Canons to Construe "Tangible Object" in Light of its Specific, Associated Terms	7
B. The Eleventh Circuit's Construction Renders Superfluous the Terms "Record" and "Document"	9
II. SECTION 1519, VIEWED IN THE BROADER CONTEXT OF SARBANES-OXLEY, INDICATES CONGRESS'S INTENT TO PROSCRIBE DESTRUCTION OF RECORDS IN FINANCIAL FRAUD CASES	10

TABLE OF CONTENTS—Continued

Page

III. THE ELEVENTH CIRCUIT'S ATTEMPT TO FIND SUPPORT IN THE FEDERAL RULES OF CRIMINAL PROCEDURE FOR ITS BROAD DEFINITION OF "TANGIBLE OBJECT" IGNORES THE DIFFERING STATUTORY CONTEXTS. 12

IV. IF THE ELEVENTH CIRCUIT'S CONSTRUCTION IS CORRECT, THEN SECTION 1519 FAILED TO PROVIDE FAIR NOTICE TO PETITIONER YATES THAT HIS CONDUCT WAS PROSCRIBED..... 14

V. THE ELEVENTH CIRCUIT CONSTRUED A CRIMINAL STATUTE BROADLY IN VIOLATION OF THE RULE OF LENITY 16

CONCLUSION 17

TABLE OF AUTHORITIES

CASES — Page(s)

Arthur Andersen v. United States,
544 U.S. 696 (2005) 2, 16

Astoria Fed. Savings & Loan Ass'n v. Solimino,
501 U.S. 104 (1991) 10

Bailey v. United States,
516 U.S. 137 (1995) 6, 9, 10

Bass v. United States,
404 U.S. 336 (1971) 16

Bhd. of R.R. Trainmen v. Balt. & O.R. Co.,
331 U.S. 519, 528 (1947) 11

Bowman Dairy Co. v. United States,
341 U.S. 214 (1951) 13

Brown v. Gardner,
513 U.S. 115 (1994) 6

Cabell v. Markham,
148 F.2d 737 (2d Cir. 1945) 6

Chicago v. Morales,
527 U.S. 41 (1999) 14

Circuit City Stores v. Adams,
532 U.S. 105 (2001) 8

C.I.R. v. Nat'l Carbide Corp.,
167 F.2d 304, 306 (2d Cir. 1948) 12

Corley v. United States,
556 U.S. 303 (2009) 9

Deal v. United States,
508 U.S. 129 (1993) 3, 5, 10

TABLE OF AUTHORITIES—Continued

Page(s)

Dole v. Steelworkers,
494 U.S. 26 (1990) 8

Dunn v. United States,
442 U.S. 100 (1979)..... 14, 15, 17

FAA v. Cooper,
132 S. Ct. 1441, 1450 (2012)..... 12

FCC v. Am. Broad. Co.,
347 U.S. 284 (1954)..... 14

Fed. Maritime Comm'n v. Seatrain Lines, Inc.,
411 U.S. 726 (1973)..... 8

Freeman v. Quicken Loans, Inc.,
132 S. Ct. 2034 (2012)..... 8

Giaccio v. Pennsylvania,
382 U.S. 399 (1966)..... 6

Haggar Co. v. Helvering,
308 U.S. 389 (1940)..... 5

Hibbs v. Winn,
542 U.S. 88 (2004)..... 9

Johnson v. United States,
559 U.S. 133 (2010)..... 3

Kolendar v. Lawson,
461 U.S. 352 (1983)..... 14

Lanzetta v. New Jersey,
306 U.S. 451 (1939)..... 14

Lawson v. FMR LLC,
134 S. Ct. 1158 (2014)..... 4

TABLE OF AUTHORITIES—Continued

Page(s)

Leocal v. Ashcroft,
543 U.S. 1 (2004) 7

McNally v. United States,
483 U.S. 350 (1987) 16

Paroline v. United States,
134 S. Ct. 1710 (2014) 8

Ratzlaf v. United States,
510 U.S. 135 (1994) 10

Robinson v. Shell Oil Co.,
519 U.S. 337 (1997) 6, 10, 12

Rowland v. California Men's Colony, Unit II Men's Advisory Council,
506 U.S. 194 (1993) 5

Scheidler v. Nat'l Org. for Women, Inc.,
537 U.S. 393 (2003) 16

Skilling v. United States,
561 U.S. 358 (2010) 16

United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.,
484 U.S. 365 (1988) 7

United States v. Arthur Andersen LLP,
No. 02-121, 2002 WL 32153945 (S.D. Tex. Mar. 14, 2002) 11

United States v. Lanier,
520 U.S. 259 (1997) 14, 15

United States v. Nixon,
418 U.S. 683 (1974) 13

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. Santos, 553 U.S. 507 (2008) 16

United States v. Sullivan, 578 F.2d 121, 124 (5th Cir. 1978) 12

United States v. Williams, 553 U.S. 285 (2008) 8

United States v. Yates, 733 F.3d 1059 (11th Cir. 2013) 10

STATUTES

18 U.S.C. § 1350 (2014) 11

18 U.S.C. § 1519 (2002) ..... *passim*

18 U.S.C. § 1520 (2014) 11

Sarbanes-Oxley Act, Pub. L. 107-204:
116 Stat. 745 (2002) 4, 11

116 Stat. 746 (2002) 11

RULES

Fed. R. Crim. P. 16 ..... 12, 13

Fed. R. Crim. P. 16(a) 13

OTHER AUTHORITIES

Cato Institute, *Cato Supreme Court Review*, (available at http://www.cato.org/supreme-court-review) 1

Robert Bolt, "A Man for All Seasons" (Vintage 1960) 17

U.S. Sentencing Guidelines Manual (2003) ... 9

INTEREST OF *AMICUS CURIAE*[1]

Established in 1977, the Cato Institute is a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

This case concerns Cato because it implicates the constitutional right of individuals to receive fair notice of conduct Congress has proscribed. Cato submits this brief to demonstrate how the Eleventh Circuit's overbroad construction of the "anti-shredding provision" in the Public Company Accounting Reform and Investor Protection Act ("Sarbanes-Oxley") failed to account for the Court's established rules of statutory construction and violated the Petitioner's right to fair notice.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Poet James Whitcomb Riley famously observed: "When I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck." In this case, the Eleventh Circuit was confronted not with a duck, but rather fish—undersized fish caught by petitioner John Yates, a

---

[1] Pursuant to Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to Rule 37.6, this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amicus* made a monetary contribution to its preparation or submission.

commercial fisherman accused of directing his crewmen to throw the aforementioned finned fauna back into the Gulf of Mexico after receiving a citation by the Florida Fish and Wildlife Commission. Mr. Yates's purported act ordinarily would amount to a civil violation, resulting in potential fines and possible suspension of his fishing license for a short period of time. The government, however, criminally prosecuted Mr. Yates three years after the conduct in question under the document-shredding provision of Sarbanes-Oxley—a provision enacted in the wake of the mass destruction of financial documents and records surrounding Enron Corporation's collapse and the resulting government investigation. That sordid episode in the nation's financial history was well-documented by this Court in *Arthur Andersen v. United States*, 544 U.S. 696 (2005).

By labeling a *fish* a "tangible object" under Sarbanes-Oxley, the government equated it with a financial "record" or "document" of the type central to the government's investigation of Arthur Andersen in the collapse of Enron and criminally prosecuted Mr. Yates for violating the document-shredding provision of Sarbanes-Oxley. But, a fish is not a record or a document. It does not walk like a record or a document (or even swim like one), and it does not quack like a record or a document. In poet Riley's surmise, a fish is neither a record nor a document.

Unfortunately for Mr. Yates—and, importantly, for countless unforeseeable future situations confronting other unsuspecting citizens—the Eleventh Circuit ignored the plain meaning of the statute, the text surrounding the term "tangible object," and the overall statutory context and intent, focusing instead on a

dictionary definition of the term. The Sarbanes-Oxley provision at issue in the case states:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any *record, document, or tangible object* with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

18 U.S.C. § 1519 (2002) (emphasis added).

Even a cursory review of the words surrounding "tangible object" makes clear that this document-shredding statute—enacted in the wake of a vast financial fraud—has no application to a fish being thrown back into the water. Unlike a record or document, it would be quite difficult indeed for a person to "make[] a false entry in" a *fish*. Considering the context of the statute, there simply is no way to equate a fish with a "record" or "document." Further, the term "tangible object" cannot possibly sweep in all physical objects, lest the terms "document" and a "record" be rendered superfluous. Determining in isolation the meaning of a word or words in a statute runs afoul of the Court's long-standing admonishment that "the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 508 U.S. 129, 132 (1993); *see also Johnson v. United States*, 559 U.S. 133, 138-139 (2010) (holding term "physical force" has "a number of meanings," and that "context determines meaning").

In this case, the circuit court impermissibly expanded the reach of Sarbanes-Oxley's document-shredding provision by ignoring surrounding words of the statute that make clear its focus was intended to be the destruction of financial records and other business-related documents—not *fish* (or even fowl). Not surprisingly, the Act's central purpose is to "protect investors" by increasing the reliability of corporate record-keeping. Pub. L. 107-204, 116 Stat. 745 (2002); *see also Lawson v. FMR LLC*, 134 S. Ct. 1158, 1161 (2014) (stating that purpose of Sarbanes-Oxley is "[t]o safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation"). Underscoring the misapplication of the statute to the conduct at issue here is the title of the provision under which Mr. Yates was criminally charged: "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy." Neither the title nor text of Section 1519 nor the overall statutory context could have given Mr. Yates fair notice that the act of throwing fish into the Gulf of Mexico following a civil citation was a violation.

The impact of the Eleventh Circuit's error does not end with Mr. Yates. If a "tangible object" includes a fish, and the act of throwing an undersized fish back into the Gulf of Mexico is a criminal violation of the Sarbanes-Oxley document-shredding provision, then federal prosecutors may use Section 1519 to punish a limitless array of conduct for minor civil infractions. As one absurd example, a smoker stealing the last few puffs of his cigarette as he enters the lobby of a government building could be criminally charged for dousing that cigarette in his coffee cup as he approaches the metal detectors manned by a federal officer. Despite the lack of any destruction or alter-

ation of a record or record-keeping device, the prospective defendant could be said to have "concealed" a "tangible object" with the intent to impede an investigation into laws that prohibit smoking in a building and thus could be subject to criminal liability for attempting to conceal his civil infraction. *See Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940) ("A literal reading of [statutes] which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose."); *see also Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 200 & n.3 (1993) (citing cases dating back to 1869 applying "the common mandate of statutory construction to avoid absurd results").

If this Court will pardon the continuing puns, *amicus* finds the government's theory here fishy.

ARGUMENT

Petitioner Yates was not given fair notice that 18 U.S.C. § 1519, a criminal provision in the Sarbanes-Oxley Act that carries a punishment of up to 20 years in prison, applied to his purported conduct directing his crewmen to throw undersized fish into the Gulf of Mexico after receipt of a *civil* citation (which merely carried a fine and potential permit suspension). Properly read in context, Section 1519 cannot be extended to the conduct at issue here.

By narrowly focusing on the dictionary meaning of the term "tangible object" in isolation and divorced from the context of Section 1519, the Eleventh Circuit violated the explicit direction of the Court for determining the scope of a statute. *See Deal*, 508 U.S. at 132 ("the meaning of a word cannot be determined in isolation, but must be drawn from the context in which

it is used"). Regardless of a dictionary definition of "tangible object," "the meaning of statutory language, plain or not, depends on context." *Bailey v. United States*, 516 U.S. 137, 145 (1995) (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994)). Indeed, nearly 70 years ago Judge Learned Hand warned that courts must resist making "a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish[.]" *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945). Courts must determine the "plainness or ambiguity of statutory language . . . by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).

If the Eleventh Circuit's broad construction of "tangible object" is correct, then Section 1519 violated Mr. Yates's constitutional right to fair notice. No average citizen could fathom that the act of throwing undersized fish into the Gulf of Mexico (or any body of water) following his receipt of a civil citation could result in a felony prosecution and 20 years in prison. Such an expansive construction of Section 1519 denied Mr. Yates fair notice by judicially creating a statute "so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402–03 (1966).

I. THE TEXT OF SECTION 1519 ITSELF INDICATES CONGRESSIONAL INTENT TO PROHIBIT DESTRUCTION OF RECORDS AND RECORD-KEEPING DEVICES

The term "tangible object" read in isolation is amorphous, overbroad and nearly limitless. A tangible object, absent context, could mean anything of form or substance. But construing the term "tangible object" in the specific context in which it is used and in the overall context of the statute gives the term the meaning Congress intended "compatible with the rest of the law." *United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

In construing a term such as "tangible object," courts are aided by three canons of statutory construction: *noscitur a sociis*, *ejusdem generis*, and the superfluous language canon. Each provides direction to courts in determining the context of a term in order to give the statute the meaning Congress intended. Applying these canons makes clear that the term "tangible object" as used in Section 1519 is most plainly understood as an object *similar* to a record or document.

A. The Eleventh Circuit Failed To Apply Statutory Interpretation Canons to Construe "Tangible Object" in Light of its Specific, Associated Terms

In order to determine the ordinary and natural meaning of a disputed term, the Court must begin with the "ordinary or natural meaning" of the term "in light of the terms surrounding it." *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004). This canon of statutory construction, *noscitur a sociis*, "counsels that a word is given

more precise content by the neighboring words with which it is associated." *United States v. Williams*, 553 U.S. 285, 294 (2008). When those neighboring words comprise a string of statutory terms, they should be given "related meaning." *Dole v. Steelworkers*, 494 U.S. 26, 36 (1990) (internal quotation marks omitted). Modifiers such as "any" that otherwise might expand the meaning of a statutory term do not operate to give the term unlimited breadth when construed in context. *Freeman v. Quicken Loans, Inc.*, 132 S. Ct. 2034, 2042 (2012).

A related canon of statutory construction, *ejusdem generis*, instructs courts that general words, such as "tangible object," should be construed to embrace "only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores v. Adams*, 532 U.S. 105, 114–15 (2001); *see also Paroline v. United States*, 134 S. Ct. 1710, 1721 (2014) ("It is . . . a familiar canon of statutory construction that [catchall] clauses are to be read as bringing within a statute categories similar in type to those specifically enumerated.") (quoting *Fed. Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973)). The Eleventh Circuit erred by failing to consider the term "tangible object" in light of its neighboring terms. The term "tangible object" in section 1519 immediately follows the terms "record" and "document" and together are given meaning by the preceding transitive verbs "alters, destroys, mutilates, conceals, covers up, falsifies [and] makes a false entry in." 18 U.S.C. § 1519. When read in this context, "record," "document," and "tangible object" all share a common characteristic—each term refers to an object capable of a record-keeping function that is able to be "alter[ed]" or "falsif[ied]" or in which a person can "make[] a false entry." Moreover, the use of the

preposition "in" means that "tangible object," as used in the anti-shredding provision, must be a thing "in" which a false entry can be made. By using the term "tangible object" in this context, Congress intended to address objects used in the record-keeping function such as hard-drives, computer discs, thumb-drives, and other media upon which information can be stored—not fish, which hardly can be falsified (not under existing technology, at least), as the statute expressly contemplates.[2]

B. The Eleventh Circuit's Construction Renders Superfluous the Terms "Record" and "Document"

The Court has instructed that statutory language must be construed under "the assumption that Congress intended each of its terms to have meaning." *Bailey*, 516 U.S. at 145. "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)). This warning to "avoid rendering superfluous" any statutory language is "heightened when

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[2] The U.S. Sentencing Commission appears to agree with *amicus's* interpretation given the following commentary: "Records, documents, or tangible objects' includes (A) records, documents, or tangible objects that are stored on, or that are, magnetic, optical, digital, other electronic, or other storage mediums or devices; and (B) wire or electronic communications." U.S. Sentencing Guidelines Manual, app. C, amend. 653 (2003). Even the district court initially observed that "if you look at the title [of Section 1519] for at least a clue as to what congress meant, it talks about destruction, alteration, or falsification of records in federal investigations. It might be a stretch to say throwing away a fish is a falsification of a record." J.A. 95.

the words describe an element of a criminal offense." *Astoria Fed. Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991); *Bailey*, 516 U.S. at 145 (quoting *Ratzlaf v. United States*, 510 U.S. 135, 140–41 (1994)).

The Eleventh Circuit's broad definition of "tangible object" renders superfluous other terms in Section 1519. Because the court's definition broadly includes any object "having or possessing physical form," the court rendered superfluous the terms "record" and "document," both of which would fall under the court's definition of tangible object. *See United States v. Yates*, 733 F.3d 1059, 1064 (11th Cir. 2013). Under the court's expansive construction, "no role remains" for the terms "record" and "document" to perform. *See Bailey*, 516 U.S. at 145. If Congress intended Section 1519 to apply so broadly as to cover any object "having or possessing physical form," as the Eleventh Circuit found, Congress would not have included the more limiting terms "record" and "document."

II. SECTION 1519, VIEWED IN THE BROADER CONTEXT OF SARBANES-OXLEY, INDICATES CONGRESS'S INTENT TO PROSCRIBE DESTRUCTION OF RECORDS IN FINANCIAL FRAUD CASES

The Court has explained on numerous occasions the need to consider statutory language in the "broader context of the statute as a whole." *Robinson*, 519 U.S. at 341; *see also Deal*, 508 U.S. at 13. The broader context of the Sarbanes-Oxley Act supports the view that the statute's reference to "tangible object" cannot possibly include a fish. Section 1519 is one provision in Sarbanes-Oxley, an Act that declares as its broad purpose: "to protect investors by improving the accuracy and reliability of corporate disclosures made

pursuant to the securities laws, and for other purposes." Pub. L. 107-204, 116 Stat. 745 (2002).

Section 1519 is part of the Act's overall scheme to protect investors. It is one of many sections explicitly aimed at "corporate and criminal fraud." Pub. L. 107-204, 116 Stat. at 746. This section addresses financial crime and the destruction of documents, whether in the form of paper records or digital files stored on a tangible object, such as a computer hard drive.[3] This statutory aim is reflected in the title of Section 1519, "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy." 18 U.S.C. § 1519. While titles are not dispositive, they are useful aids that provide "a short-hand reference to the general subject matter involved." *Bhd. of R.R. Trainmen v. Balt. & O. R. Co.*, 331 U.S. 519, 528 (1947).

Other criminal provisions in the Sarbanes-Oxley Act illustrate the Act's focus on financial records and record-keeping. For example, Sarbanes-Oxley added Section 1520 to Title 18, making it a crime for accountants to fail to maintain audit or review work papers for a period of five years, and Section 1350, imposing criminal sanctions on corporate officers who fail to certify financial reports. *See* 18 U.S.C. § 1520 (2014); 18 U.S.C. § 1350 (2014).

There is little doubt that Sarbanes-Oxley is focused on financial fraud in the context of public companies, and therefore has nothing to do with fish. Indeed, outside this specific prosecution, undersigned counsel

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[3] In Arthur Andersen's case, the destruction of records and documents included computer hard drives and the email system that preserved documentation related to Enron Corporation. *See United States v. Arthur Andersen LLP*, No. 02-121, 2002 WL 32153945, at ¶ 10 (S.D. Tex. Mar. 14, 2002) (indictment).

is unaware of any provision of Sarbanes-Oxley being applied to commercial fishing—or any other animal husbandry.

III. THE ELEVENTH CIRCUIT'S ATTEMPT TO FIND SUPPORT IN THE FEDERAL RULES OF CRIMINAL PROCEDURE FOR ITS BROAD DEFINITION OF "TANGIBLE OBJECT" IGNORES THE DIFFERING STATUTORY CONTEXTS

In construing the term "tangible object," the Eleventh Circuit relied on a Fifth Circuit case holding that cocaine fell within the meaning of "tangible object" as used in Rule 16 of the Federal Rules of Criminal Procedure. *United States v. Sullivan*, 578 F.2d 121, 124 (5th Cir. 1978). But, as Learned Hand once warned, "words are chameleons, which reflect the color of their environment." *C.I.R. v. Nat'l Carbide Corp.*, 167 F.2d 304, 306 (2d Cir. 1948) *see also FAA v. Cooper*, 132 S. Ct. 1441, 1450 (2012) ("Because the term 'actual damages' has this chameleon-like quality, we cannot rely on any all-purpose definition but must consider the particular context in which the term appears."). Identical words may carry very different meanings depending on the context in which they are used. *See Robinson*, 519 U.S. at 343-44 (explaining that the word "employees" took on different meanings within different sections of the Civil Rights Act of 1964).

The term "tangible object" carries a far different meaning in the context of Rule 16 than it does with respect to Section 1519. In order to afford a defendant due process and to safeguard against surprises at trial, Rule 16 allows a defendant in any federal criminal case to inspect, copy, or photograph prior to trial any

potential evidence in the possession of prosecutors. Fed. R. Crim. P. 16(a). The rule states:

> Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items[.]

Fed. R. Crim. P. 16(a).

"Tangible object" in Rule 16 appears in an expansive list that encompasses any physical evidence that might be used by prosecutors at trial. When an enumerated list of items spans everything from books and buildings to papers and places, it is clear that the statute encompasses any potential evidence that might be relevant to the government's case against a defendant or relevant to a defense.

Within the broad statutory context, Rule 16 is construed liberally in order to protect the rights of defendants and the criminal justice system as a whole. Rule 16 provides the means for a defendant to examine and inspect the evidence the government has accumulated against him. *See Bowman Dairy Co. v. United States*, 341 U.S. 214, 219 (1951). It also protects the fairness of the criminal justice system, which "would be defeated if judgments were to be founded on a partial or speculative presentation of the facts." *United States v. Nixon*, 418 U.S. 683, 709 (1974). Indeed, "the very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence." *Id.*

While protections afforded to a criminal defendant are to be construed liberally, it is a "well-established

principle that penal statutes are to be construed strictly." *FCC v. Am. Broad. Co.* 347 U.S. 284, 296 (1954). A broad interpretation of "tangible object" in Section 1519 violates the canons of statutory construction and allows for arbitrary enforcement of a criminal statute by police and prosecutors.

IV. IF THE ELEVENTH CIRCUIT'S CONSTRUCTION IS CORRECT, THEN SECTION 1519 FAILED TO PROVIDE FAIR NOTICE TO PETITIONER YATES THAT HIS CONDUCT WAS PROSCRIBED

If "tangible object" means anything having a physical form, as the Eleventh Circuit found, then Section 1519 deprived Mr. Yates of his constitutional right to fair notice. No person is required "at peril of life, liberty or property to speculate as to the meaning" of a criminal statute. *Chicago v. Morales*, 527 U.S. 41, 58 (1999) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)); *see also United States v. Lanier*, 520 U.S. 259, 266 (1997). When considering the reach of a statute, courts must decline to impose punishment if the covered conduct is not "plainly and unmistakably proscribed." *Dunn v. United States*, 442 U.S. 100, 113 (1979). Failing to exercise this appropriate judicial restraint in the criminal context "allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolendar v. Lawson*, 461 U.S. 352, 358 (1983) (quotations omitted).

Under the Eleventh Circuit's view, Section 1519 provides prosecutors unfettered discretion to apply the statute at their whim to an unfathomable range of conduct. The Court need look no further than the egregious application of Section 1519 to Mr. Yates's conduct. Federal prosecutors—three years after the

conduct in question—used the provision to prosecute and convict Mr. Yates of a felony, resulting in his imprisonment, when the most he faced for catching undersized fish was a *civil* monetary fine and a short suspension of his fishing permit. No one could have imagined that Mr. Yates's conduct was "plainly and unmistakably proscribed" by Sarbanes-Oxley's anti-shredding statute. *Dunn*, 442 U.S. at 113.

The Eleventh Circuit's excessively broad construction of "tangible object" could lead to criminalizing a wide range of conduct that was never contemplated by Section 1519. An overly ambitious federal prosecutor might use Section 1519 to criminally prosecute the smoker described *supra* or a tourist for hiding an open beer bottle in a brown paper bag when approached by Park Police (the tourist having "concealed" a "tangible object" with the intent to impede an investigation into violations of open container laws). Hunters could be in jeopardy if they shoot an animal out of season—including one of poet Riley's ducks—and then destroy the evidence by eating it. Even the non-smoking, teetotaling, vegan protestor might face criminal prosecution if he burns a copy of the tax code in front of the IRS in an attempt to "influence" a tax-regulation deliberation inside.

Because of the limitless scope of possible violations, ordinary citizens would be forced to "guess at [Section 1519's] meaning and differ as to its application." *Lanier*, 520 U.S. at 266. By adopting a more focused construction of Section 1519 that considers the text of the statute, the specific context of its words, and the broader context of the statute as a whole, the Court could construe the term "tangible object" with sufficient clarity to provide fair notice and prevent arbitrary enforcement.

V. THE ELEVENTH CIRCUIT CONSTRUED A CRIMINAL STATUTE BROADLY IN VIOLATION OF THE RULE OF LENITY

Any doubt about statutory construction of "tangible object" after examining Section 1519's language, its specific context, and the broader context of Sarbanes-Oxley should be resolved in favor of the defendant. The rule of lenity reflects the long-standing tradition of the Court to "exercise[] restraint in assessing the reach of a federal criminal statute[.]" *Andersen*, 544 U.S. at 703 (internal citation omitted). This tradition is grounded in the principle that "legislatures and not courts should define criminal activity." *Bass v. United States*, 404 U.S. 336, 348 (1971) (internal citation omitted). The rule of lenity is triggered when a court is confronted with "two rational readings of a criminal statute, one harsher than the other." *McNally v. United States*, 483 U.S. 350, 359 (1987). The Court "choose[s] the harsher only when Congress has spoken in clear and definite language." *Id.* Thus, any "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Skilling v. United States*, 561 U.S. 358, 410 (2010) (internal citation omitted).

The unconstrained ability of prosecutors to pursue felony charges against Mr. Yates three years after he received a *civil* citation is unduly "harsh." *See, e.g.*, *United States v. Santos*, 553 U.S. 507, 514 (2008) (limiting the definition of "proceeds" in the federal money-laundering statute in favor of the defendant); *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 408 (2003) (rejecting a harsh application of the term "extortion" in the Hobbs Act in favor of the defendant). The rule of lenity reinforces *amicus's* reasoning that the construction of "tangible object" in Section 1519

should be limited to items similar or naturally fitting within the category of records or documents. This more reasonable reading limits the ability of prosecutors to transform civil infractions into felonies. Even if the Court does not adopt the method of statutory construction *amicus* advocates, the rule of lenity leads to the same outcome: Mr. Yates's conviction should be reversed.

CONCLUSION

The conduct at issue here, disposing of allegedly undersized fish, was not "plainly and unmistakably proscribed," by Section 1519. *Dunn*, 442 U.S. at 112–13. The Eleventh Circuit's interpretation of "tangible object"—in isolation and divorced from its context—violated the Court's principles of statutory construction and consequently Mr. Yates's constitutional right to fair notice. For Mr. Yates and every other individual in this country, "[t]he law is a causeway upon which, so long as he keeps to it, a citizen may walk safely." Robert Bolt, "A Man for All Seasons" Act II, 89 (Vintage 1960) (speech of Sir Thomas More). The government's standardless construction of Section 1519 erodes that causeway, forcing citizens to embark with unsure footing upon potentially treacherous journeys. The Court should ensure that the causeway remains secure by reversing the lower court's ruling.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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BRIEFS

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IN THE

Supreme Court of the United States

JOHN L. YATES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF CAUSE OF ACTION, SOUTHEASTERN LEGAL FOUNDATION AND TEXAS PUBLIC POLICY FOUNDATION AS *AMICI CURIAE* SUPPORTING PETITIONER

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TABLE OF CONTENTS

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. Captain Yates's Fish Are Not "Tangible Objects" Under Section 1519. 6

II. Captain Yates's Conduct Is Sufficiently Covered By Existing Laws, and the Eleventh Circuit's Decision Renders 18 U.S.C. § 2232(a) Entirely Superfluous 7

III. The Eleventh Circuit's Construction of Section 1519 Criminalizes Ordinary Conduct 9

IV. Section 1519 Is Being Used As A Sword Of Executive Overreach, Not As A Shield Against Financial Fraud 14

V. The Eleventh Circuit's Decision Ignores Captain Yates's Due Process Rights 21

CONCLUSION 27

TABLE OF AUTHORITIES

CASES: Page

Abramski v. *United States*,
134 S. Ct. 2259 (2014) 13

Abuelhawa v. *United States*,
556 U.S. 816 (2009) 11

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553 U.S. 137 (2008) 14

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134 S. Ct. 2077 (2014) 12

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378 U.S. 347 (1964) 23

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269 U.S. 385 (1926) 22

Griffin v. *Oceanic Contractors, Inc.*,
458 U.S. 564 (1982) 7, 13

Guiseppi v. *Walling*,
144 F.2d 608 (2d Cir. 1944) 7

Hubbard v. *United States*,
514 U.S. 695 (1995) 23

Kolender v. *Lawson*,
461 U.S. 352 (1983) 22, 24

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968 F.2d 388 (3d Cir. 1992) 24

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134 S.Ct. 1158 (2014) 4

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76 U.S. 468 (1869) 12

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283 U.S. 25 (1931) 23, 26, 27

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133 S. Ct. 1678 (2013) 11

Pa. Dept. of Public Welfare v. *Davenport*,
495 U.S. 552 (1990) 9

Rabe v. *Washington*,
405 U.S. 313 (1972) 23

Rewis v. *United States*,
401 U.S. 808 (1971) 13

United States v. *Alvarez*,
132 S. Ct. 2357 (2012) 19, 20

United States v. *Am. Trucking Ass'n*,
310 U.S. 534 (1940) 11

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No. 2:99-CR-100-FtM-25D (M.D. Fla. 1999) 9

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No. 5:12-cr-00002-EJD (N.D. Cal. 2012) 14

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No. 12-1146, 2014 WL 2807314 (June 23,
2014) 2

Williams v. *United States*,
458 U.S. 279 (1982) 5

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The Marine Mammal Protection Act

16 U.S.C. § 1362(13) 15
16 U.S.C. § 1362(18) 15
16 U.S.C. § 1372(a)(2)(A) 15
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16 U.S.C. § 1 10

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16 U.S.C. § 1859(a) 9

16 U.S.C. § 1859(b) 9

18 U.S.C. § 116 4

18 U.S.C. § 711 10

18 U.S.C. § 711a 5

18 U.S.C. § 922(g)(1) 21
18 U.S.C. § 1001(a)(2) 3
18 U.S.C. § 1091(c) 4
18 U.S.C. § 1585 4
18 U.S.C. § 1705 10
18 U.S.C. § 2074 5
18 U.S.C. § 2232(a) 3, 5, 7, 9
18 U.S.C. § 2339 4
18 U.S.C. § 2389 4
19 U.S.C. § 1497(a) 10
21 U.S.C. § 331(t) 11
Conn. Gen. Stat. § 21-40 21
Fla. Stat. § 97.041(b) 22
La. R.S. 18:102 21
NY CLS Bank § 599-e(b) 21

RULES AND REGULATIONS:

29 C.F.R. § 1910.141(g)(2) 10
36 C.F.R. § 3.17(b) 10

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INTEREST OF *AMICI CURIAE*[1]

Cause of Action, Inc. ("Cause of Action") is a nonprofit, nonpartisan organization that uses investigative, legal, and communications tools to educate the public about how government accountability and transparency protect taxpayer interests and economic opportunity. As part of this mission, Cause of Action highlights the linked problems of overcriminalization and government overreach—*i.e.*, the proliferation of statutes and regulations that impose harsh penalties for unremarkable conduct, and the propensity of prosecutors to push (and even exceed) any limits that those laws contain. Cause of Action's interest in this case is longstanding. It filed a brief in support of the petition for writ of certiorari in this Court on February 5, 2014.

Southeastern Legal Foundation ("SLF"), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties, private property rights, free enterprise, and government accountability in the courts of law and public opinion. SLF drafts legislative models, educates the public on important policy issues, and litigates regularly before this Court. SLF's direct interest in this case stems from its profound commitment to protecting America from

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and neither the parties nor their counsel, nor anyone except *amici* and their counsel, financially contributed to preparing this brief.

overreach by the Executive Branch. The separation of powers enshrined in the Constitution is a vital component of the Nation's laws and a critical safeguard of political liberty. Most recently, SLF litigated *Southeastern Legal Foundation* v. *EPA*, consolidated with *Utility Air Regulatory Group* v. EPA, No. 12-1146, 2014 WL 2807314 (June 23, 2014), a constitutional separation of powers case, before this Court. Like the EPA consolidated case, this case concerns an aggrandizement of Executive authority contrary to separation of powers and thus implicates one of SLF's core concerns.

The Texas Public Policy Foundation is a non-profit, non-partisan research institute founded in 1989. The Foundation's mission is to promote and defend liberty, personal responsibility, and free enterprise throughout Texas and the U.S. by educating policymakers and the national public policy debate with academically sound research and outreach. The Foundation's Center for Effective Justice and its Right on Crime initiative are leading national efforts to combat overcriminalization, or the effort to regulate non-blameworthy business activity through criminal law. The Foundation is mission-bound to help the Court understand the threat of overcriminalization—and thus the threat to liberty and free enterprise—that is present in this case.

Petitioner's prosecution and conviction represent the very type of unbounded criminal liability and executive overreach that *amici* exist to prevent.

SUMMARY OF ARGUMENT

Petitioner John L. Yates, captain of the commercial fishing boat *Miss Katie*, ordered a crew member to throw overboard six dozen undersized red grouper, after being instructed to take the fish back to port for inspection by the National Marine Fisheries Service ("NMFS"). While this prevented the NMFS from measuring the fish, the fish themselves were evidence of, at most, a civil infraction, not a crime. Such conduct typically results in a civil fine or a temporary fishing license suspension under the Magnuson-Stevens Act.[2] And, in fact, Captain Yates was cited for a civil infraction and penalized accordingly.

The Government, however, did not stop there. Three years after the civil citation, the Government charged and convicted Captain Yates of multiple crimes, including felony violation of the Sarbanes-Oxley Act's "anti-shredding" provision, 18 U.S.C. § 1519 ("Section 1519").[3] Sarbanes-Oxley was passed by Congress "[t]o protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws" (Pub. L. No.

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[2] Southeast Region Magnuson–Stevens Act Penalty Schedule, available at http://www.gc.noaa.gov/documents/gces/2-USFisheries/SE_msa_comm_rec_6-03.pdf (last visited July 3, 2014) (noting that "Violations Regarding Failing to Make Fish or Documents Available for Inspection" warrants a fine beginning at $500 or permit sanctions).

[3] Yates was also charged and convicted under 18 U.S.C. § 2232(a), entitled "Destruction or Removal of Property to Prevent Seizure," and charged with making false statements under 18 U.S.C. § 1001(a)(2), under which he was acquitted.

107–204, 116 Stat. 745, 745) and "[t]o safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation." *Lawson* v. *FMR LLC*, 134 S.Ct. 1158, 1161 (2014).

The Section 1519 charge carried a prison sentence of up to twenty years. Accordingly, for ordering a crew member to throw red grouper overboard, Captain Yates faced more prison time than if he had violated other federal laws covering violent and cruel criminal conduct, including inciting genocide, harboring terrorists, selling slaves, circumcision of a female child, or even raising an army against the United States. *Compare* 18 U.S.C. § 1519 *with* 18 U.S.C. § 1091(c) (five-year maximum for inciting genocide), § 2339 (ten-year maximum for harboring or concealing terrorists), § 1585 (seven-year maximum for selling slaves), § 116 (five year maximum for mutilating the genitals of a minor female), and § 2389 (five-year maximum for recruiting an army against the United States).

The Government's use of Section 1519 to hammer Captain Yates is quintessential Executive Branch overreach, and the Eleventh Circuit's decision should be reversed for at least the following reasons. First, there is no suggestion that Congress imagined, much less intended, that Section 1519 would apply to fish of any size. Congress expressly enacted Section 1519 to close legal loopholes contributing to corporate financial scandals—not to regulate fishermen. Therefore, the Eleventh Circuit erroneously construed the statutory term "tangible objects" to include red grouper.

Second, while Captain Yates's conduct is covered by many other statutes and regulations, Section 1519 was intended to cover document destruction offenses that were *not* adequately prohibited by existing law. The decision below erroneously rendered 18 U.S.C. § 2232(a), among other laws, superfluous.

Third, the Eleventh Circuit's construction results in a classic example of overcriminalization because it permits prosecutors to use Section 1519 to turn minor civil or criminal infractions into serious felonies, leading to absurd results. For example, individuals who destroy a misappropriated image of "Woodsy Owl," see 18 U.S.C. § 711a, or a videotape of a false weather report, see 18 U.S.C. § 2074, will face up to twenty years in prison if the decision below is affirmed.

Fourth, the notion that Captain Yates had fair notice that throwing red grouper overboard was a felony under Section 1519 is absurd. Due process is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.

The Eleventh Circuit's decision, if allowed to stand, will continue to "make a surprisingly broad range of unremarkable conduct a violation of federal law." *Williams* v. *United States*, 458 U.S. 279, 286 (1982). We urge this Court to properly limit Section 1519's scope to halt the Government's improper over-reach. Captain Yates's conviction under Section 1519 should be reversed.

ARGUMENT

I. Captain Yates's Fish Are Not "Tangible Objects" Under Section 1519.

Section 1519 criminalizes the knowing destruction or concealment of a "record, document or tangible object" with the intent to "impede, obstruct, or influence" a government investigation.[4]

Congress was not unclear about Section 1519's purpose or ambit. It is entitled "Destruction, alteration, or falsification of *records* in Federal investigations and bankruptcy."[5] It was placed under the heading "Criminal Penalties for *Altering Documents*."[6] It was described in the Senate Report as an "anti-shredding provision."[7] It was passed as part of the Sarbanes Oxley Act, a statute designed to ward off the next massive financial scandal by, among other things, levying substantial penalties for destroying evidence of financial fraud.[8]

The Eleventh Circuit ignored this. Instead, based solely on the dictionary, it erroneously (and

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[4] In full, Section 1519 reads: "Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both."

[5] Pub. L. No. 107–204, § 802, 116 Stat. 800 (emphasis added).

[6] *Id.* (emphasis added).

[7] S. Rep. No. 107–146, at 14 (2002).

[8] *Id.* at *1.

absurdly) concluded Captain Yates's fish were "tangible objects" under Section 1519. Of course a fish is a "tangible object." But whether a fish is a "tangible object" for purposes of *this particular statute* is a separate issue. See, *e.g.*, *Guiseppi* v. *Walling*, 144 F.2d 608, 624 (2d Cir. 1944) (L. Hand, J.) ("literal meaning" construction that contradicts Congress's manifest statutory purpose should be avoided); see also *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (interpretations of a statute producing "absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.")[9]

II. Captain Yates's Conduct Is Sufficiently Covered By Existing Laws, and the Eleventh Circuit's Decision Renders 18 U.S.C. § 2232(a) Entirely Superfluous

Section 1519 was intended to close gaps "relating to the destruction or fabrication of evidence and the preservation of financial and audit records." S. Rep. No. 107-146 (2002). The Report concluded that those

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[9] As Judge Hand put it:

> [I]n every interpretation we must pass between Scylla and Charybdis; and I certainly do not wish to add to the barrels of ink that have been spent in logging the route. As nearly as we can, we must put ourselves in the place of those who uttered the words, and try to divine how they would have dealt with the unforeseen situation; and, although their words are by far the most decisive evidence of what they would have done, they are by no means final.

Guiseppi, 144 F.2d at 624.

"ambiguities and technical limitations" had contributed to the Enron scandal. S. Rep. 107-146 at 12 (2002). Therefore, Section 1519 was intended to "close loopholes in the existing criminal laws relating to the destruction or fabrication of evidence and the preservation of financial and audit records." *Id.* at 14; see also *ibid.* (noting that Section 1519 addresses the problem of "certain current provisions mak[ing] it a crime to persuade another person to destroy documents, but not [making it] a crime to actually destroy the same documents yourself").

However, Captain Yates's conduct was already covered by multiple statutes and regulations. The Magnuson-Stevens Act requires fishermen to make fish available for inspection. Failing to do so generally warrants a civil fine beginning at $500 and/or a license suspension.[10] That Act also covers more serious fisheries infractions—such as impeding a search for undersized fish, or even forcibly resisting a search. These are federal misdemeanors punishable by at most six months' imprisonment, except in the most aggravated cases involving a dangerous weapon or risk of bodily injury. See 16 U.S.C. §§ 1857(1)(E), 1859(a), (b).

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[10] The NOAA Office of General Counsel for Enforcement and Litigation publishes each region's Magnuson-Stevens Act Penalty Schedule, which provides the penalty range for each type of prohibited conduct. *See* Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions NOAA Office of the General Counsel – Enforcement and Litigation, available at http://www.gc.noaa.gov/documents/0316611_penalty_policy.pdf (last visited July 2, 2014).

Section 2232(a), entitled "Destruction or Removal of Property to Prevent Seizure," also applies and, in fact, Captain Yates was charged and convicted under this statute as well.[11] Violating Section 2232(a) triggers a potential five-year maximum penalty—far less than Section 1519's twenty-year maximum penalty—for knowingly destroying, damaging, or disposing of property that the government has the authority to search or seize.

The Eleventh Circuit's erroneous construction of Section 1519 means that Section 1519 encompasses *all* conduct criminalized by § 2232(a), rendering it superfluous in violation of the "cardinal principle of statutory construction that repeals by implication are not favored." *United States* v. *United Cont'l Tuna Corp.*, 425 U.S. 164, 168 (1976). See also *Pa. Dep't. of Public Welfare* v. *Davenport*, 495 U.S. 552, 562 (1990) (expressing "deep reluctance to interpret a statutory provision so as to render superfluous other" statutory provisions) (citation omitted).

III. The Eleventh Circuit's Construction of Section 1519 Criminalizes Ordinary Conduct

Since virtually anything can trigger an "investigation" of a "matter within the jurisdiction of [a] department or agency of the United States,"

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[11] See, *e.g.*, *United States* v. *Dehmer*, No. 2:99-CR-100-FtM-25D (M.D. Fla. 1999). In fact, during Captain Yates's sentencing hearing, the government relied on *Dehmer*, a pre-Sarbanes-Oxley case involving a commercial fisherman who was convicted under Section 2232(a) for willfully throwing undersized fish overboard to prevent seizure by the U.S. Coast Guard. Sentencing Hr'g Tr. 60:4-12, May 12, 2012.

disposal of most anything can fall within the scope of Section 1519. It does not have to be evidence of an alleged crime. For instance, destroying evidence of a minor regulatory violation or a civil infraction could, under the Eleventh Circuit's reasoning, violate Section 1519.

This would include a person who destroys a misappropriated image of "Smokey Bear,"[12] conceals evidence of a surfboard being used on a beach designated for swimming,[13] throws away a bag of chips from a workplace restroom prior to an OSHA inspection,[14] fails to declare an item on a customs form at the airport,[15] gets rid of a bat used in a teenager's game of "mailbox baseball,"[16] or discards an empty container of medicine purchased from a foreign pharmacy.[17]

Section 1519 cannot reasonably be read to cover the destruction of these tangible objects, given that doing so would convert relatively minor civil or

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[12] Misappropriating an image of Smokey Bear is prohibited under 18 U.S.C. § 711.

[13] 16 U.S.C. §§ 1, 1a–2(h), 1a–6 & 9a (2006); 36 C.F.R. § 3.17(b) (prohibiting the use of surfboards within a designated swimming area).

[14] Under 29 C.F.R. § 1910.141(g)(2), administered by the Occupational Safety and Health Administration, an employer faces civil penalties for allowing his employees to consume food in a restroom.

[15] 19 U.S.C. § 1497(a) (noting penalties for having articles neither "included in the declaration" nor "mentioned before the examination of baggage").

[16] 18 U.S.C. § 1705 (criminalizing the destruction of mail boxes).

[17] 21 U.S.C. § 331(t) (prohibiting the "purchase of a drug" in a foreign pharmacy).

criminal offenses into twenty-year felonies—and there is absolutely no suggestion that Congress ever intended to transfer that power to agencies of the Executive Branch. *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1691 (2013) ("[T]here is a more fundamental flaw in the Government's approach: It would render even an undisputed misdemeanor an aggravated felony. This is 'just what the English language tells us not to expect,' and that leaves us 'very wary of the Government's position.'") (citation omitted); *Abuelhawa* v. *United States*, 556 U.S. 816, 822–23 (2009) ("Given the [Controlled Substances Act's] distinction between simple possession and distribution, and the background history of these offenses, it is impossible to believe that Congress intended 'facilitating' to cause that twelve-fold quantum leap in punishment for simple drug possessors."). Such an interpretation also clearly contravenes Congress's intent that Section 1519 be used "to ensure that individuals who destroy evidence with the intent to impede a pending or future *criminal* investigation are punished." S. Rep. No. 107-146, at 27 (2002) (emphasis added); *cf. United States* v. *Am. Trucking Ass'n*, 310 U.S. 534, 543 (1940) (explaining that when the "plain meaning" of words "has led to absurd or futile results . . . this Court has looked beyond the words to the purpose of the act."); see also *Lionberger* v. *Rouse*, 76 U.S. 468, 475 (1869) ("It is a universal rule in the exposition of statutes that the intent of the law, if it can be clearly ascertained, shall prevail over the letter, and this is especially true where the precise words, if construed in their ordinary sense, would lead to manifest injustice."). In sum, there are

"deeply serious consequences of adopting such a boundless reading" of Section 1519. See *Bond* v. *United States*, 134 S. Ct. 2077, 2090 (2014).

The Eleventh Circuit's construction of Section 1519 is so removed from common sense that it also leads to absurd results. For example, consider the government's position that commercial fishing boat operators are liable under the Magnuson-Stevens Act for possessing fish that were caught at a legal size but subsequently shrunk due to being kept on ice. Sentencing Hr'g Tr. 28:2-4 (noting that the vessel's operator is "held accountable" for any shrinkage that occurs after fish are placed on ice and must "make sure that his fish on board are always going to be above the size limit"). If operators are responsible for measuring fish after they were caught and iced,[18] then throwing overboard dead fish that had been *legally* caught but shrank during transport can violate Section 1519. Properly cabining Section 1519's scope to conduct pertaining to the destruction of corporate records and documents that was inadequately criminalized prior to Sarbanes-Oxley avoids such absurdity. Accord *Griffin*, 458 U.S. at 575.

The "context, structure, history, and purpose" of Section 1519 all support an interpretation limited to document destruction offenses that were not adequately prohibited by existing law, which resolves

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[18] *Id.* at 27:7-10 (Government: "So if that means the [operator] needs to measure the fish four days later, because he caught them at 1/16th of an inch over 20 inches and they've shrunk, then he needs to do that.").

the ambiguity created by the statute's broad text. See *Abramski* v. *United States*, 134 S. Ct. 2259, 2272 n.10 (2014) ("Although the text creates some ambiguity, the context, structure, history, and purpose [of the statute] resolve it."). Additionally, the rule of lenity applies. *Ibid.* (noting that lenity applies "if after considering text, structure, history and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended") (internal quotation marks omitted); *Rewis* v. *United States*, 401 U.S. 808, 812 (1971) (instructing that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity"). "The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States* v. *Santos*, 553 U.S. 507, 514 (2008). This Court should hold that throwing undersized fish overboard does not fall within the ambit of Section 1519 because Congress failed to clearly indicate "the harsher alternative." *Cleveland* v. *United States*, 531 U.S. 12, 24-25 (2000) (rejecting the Government's broad interpretation of "property" in a criminal statute and noting that "it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite") (internal quotation marks and citation omitted); see also *Begay* v. *United States*, 553 U.S. 137 (2008) (holding that the catch-all language at the end of a criminal statute be limited to crimes similar to those enumerated at the beginning of the provision).

IV. Section 1519 Is Being Used As A Sword Of Executive Overreach, Not As A Shield Against Financial Fraud.

Section 1519 has become a "significant new weapon in the arsenal of a federal prosecutor." Dana E. Hill, *Anticipatory Obstruction of Justice: Preemptive Document Destruction Under the Sarbanes-Oxley Anti-Shredding Statute, 18 U.S.C. § 1519*, 89 CORNELL L. REV. 1519, 1529 (2004). Contrary to Congress's intent, the Government is not using Section 1519 to shield Americans from corporate and financial fraud and criminality. Instead, the Executive Branch is using the statute as a sword to attack citizens for minor offenses.

For example, Nancy Black, a marine biologist, was indicted under Section 1519 for providing a video recording of whale watching activity to the National Oceanic and Atmospheric Administration—which was investigating whether her colleagues violated federal law by whistling at whales—that had been edited to highlight the whistling. Indictment at 4, *United States* v. *Nancy Black*, No. 5:12-cr-00002-EJD (N.D. Cal. 2012). While her colleagues' whistling was at most a misdemeanor,[19] Ms. Black faced up to twenty years in prison.[20]

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[19] The Marine Mammal Protection Act ("MMPA") prohibits the unauthorized "take" by any person of any marine mammal in waters under the jurisdiction of the United States. 16 U.S.C. §1372(a)(2)(A). The term "take" includes to "harass" any marine mammal. *Id.* at §1362(13). "Harassment" means any act of pursuit, torment, or annoyance which has the potential to injure a marine mammal or to disturb a marine mammal by

The rapid expansion of federal administrative law has resulted in a multitude of Executive agencies empowered to investigate alleged violations of countless federal regulations. John Baker, Jr., *Revisiting the Explosive Growth of Federal Crimes*, THE HERITAGE FOUNDATION, Legal Memorandum No. 26 (June 16, 2008), *available at* http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes; Gary Fields & John Emshwiller, *As Criminal Laws Proliferate, More Are Ensnared,* WALL ST. J., July 23, 2011, http://online.wsj.com/news/articles/SB10004240527487037495045761727141846016 54 (last visited July 3, 2014). In 2009, it was estimated that there were more than 300,000 regulations within the federal code that could possibly trigger criminal sanctions. *Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the*

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causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering. *Id.* at §1362(18). A person who knowingly violates this provision of the MMPA faces a fine or imprisonment of not more than a year. *Id.* at 1375(b).

[20] The government's original charges could have resulted in up to 27 years in prison, a $700,000 fine and forfeiture of her research vessel. Eventually, Ms. Black pleaded guilty to a single misdemeanor charge of violating a Marine Mammal Protection Act regulation prohibiting "feeding," for which she received a $12,500 fine, 3 years of probation, and 300 hours of community service. See Barnini Chakraborty, *'Excessive': Marine biologist ends 7-year legal battle with feds over feeding whales*, FOXNEWS.COM (Jan. 17, 2014), http://www.foxnews.com/politics/2014/01/17/over-criminalized-scientist-settles-7-year-legal-nightmare-with-feds-over/ (last visited July 2, 2014).

Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary, 111th Cong. 7 (2009) (testimony of Richard Thornburgh, former Att'y Gen. of the United States).[21] Despite many of these offenses being vague, *malum prohibitum*, and arbitrarily enforced,[22] the government maintains that concealing evidence of these offenses is a twenty-year felony under Section 1519. Given the increasingly broad reach of the Executive Branch, it is critical for this Court to properly confine the scope of Section 1519 in order to prevent unwarranted expansion.

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[21] See also Brian W. Walsh & Tiffany M. Joslyn, THE HERITAGE FOUNDATION, *Without Intent: How Congress Is Eroding The Criminal Intent Requirement In Federal Law* 6 (2010) (noting that the number of offenses in the U.S. Code was at least 4,450 by 2008); John S. Baker, Jr. & Dale E. Bennett, *Measuring The Explosive Growth Of Federal Crime Legislation,* FEDERALIST SOC'Y FOR LAW & PUB. POLICY STUDIES, 5, 7-10 (2004) (noting the difficulties in obtaining an accurate count of federal criminal laws due to dispersion throughout the federal code and multiple crimes embedded in single statutes).

[22] See, *e.g.*, Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. Crim. L. & Criminology 643, 673 (2006) (noting that "the overbreadth, vagueness, and redundancy of the code give prosecutors power that they are not supposed to have in a decently-functioning system of justice"); Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 881 (2005) ("[T]he expansion of the criminal code has seemed to be driven by politics rather than by a demonstrated need for expanded coverage."). Task Force on the Federalization of Criminal Law, *The Federalization of Criminal Law*, 1998 A.B.A. CRIM. JUST. SEC. 1, 5–14 ("Congressional activity making essentially local conduct a federal crime has accelerated greatly . . . contribut[ing] to a patchwork of federal crimes often lacking a principled basis.").

It is no comfort that the government rarely prosecutes the destruction of evidence pertaining to civil infractions and misdemeanors under Section 1519. A single misuse of Section 1519—as in Captain Yates's case—is unlawful. And rarely enforcing the alleged outer ambit of Section 1519 could lead to arbitrary and capricious enforcement. See Paul Larkin, *Public Choice Theory & Overcriminalization*, 36 HARV. J. L. & PUB. POLICY 715, 751-51(2013) ("One risk [of rarely enforced crimes] is that prosecutors will make charging decisions based on irrational factors, such as the value that a particular case holds for an ambitious lawyer or the number of points it will add to his batting average."); Alex Kozinski & Misha Tseytlin, You're (Probably) a Federal Criminal, in IN THE NAME OF JUSTICE: LEADING EXPERTS REEXAMINE AIMS OF CRIMINAL LAW, 44 (Timothy Lynch ed. 2009) ("[A] ubiquitous criminal law becomes a loaded gun in the hands of any malevolent prosecutor or aspiring tyrant.").

For example, during the years that Captain Yates has been subjected to criminal prosecution, there have been multiple cases of document destruction by federal officials. In 2011, during the course of an Inspector General investigation into NOAA's Office of Enforcement, then director Dale J. Jones, Jr. actually did shred documents, objects clearly within Section 1519's ambit, to conceal evidence.[23] But

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[23] See Richard Gaines, *Documents: NOAA chief was told of shredding*, GLOUCESTER TIMES, Feb. 18, 2011, http://www.gloucestertimes.com/local/x740790797/Documents-NOAA-chief-was-told-of-shredding (last visited July 3, 2014).

Jones was not prosecuted—instead, he was given a different job. Similarly, Charles Edwards, former Department of Homeland Security Inspector General, allegedly destroyed documents to impede a federal investigation into his office.[24] Edwards, too, was reassigned to another federal job. There have been many other cases of document destruction by federal employees, but to date there has not been a single Section 1519 prosecution against any of them.[25] This is an obvious double standard: a federal employee who destroys *documents* to obstruct an

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[24] See STAFF OF S. COMM. ON HOMELAND SEC. AND GOV. AFFAIRS, SUBCOMM. ON FIN. AND CONTRACTING OVERSIGHT, 113th CONG., INVESTIGATION INTO ALLEGATIONS OF MISCONDUCT BY THE FORMER ACTING AND DEPUTY INSPECTOR GENERAL OF THE DEPARTMENT OF HOMELAND SECURITY (2014), available at http://www.ronjohnson.senate.gov/public/_cache/files/4f916bda-8373-4ac8-b2cd-4d0ba115e279/fco-report-investigation-into-allegations-of-misconduct-by-the-former-acting-and-deputy-inspector-general-of-the-department-of-homeland.pdf (last visited July 3, 2014); Zach Rausnitz, *Edwards resigns from DHS OIG amid allegations*, FIERCEHOMELANDSECURITY.COM, Dec. 17, 2013, http://www.fiercehomelandsecurity.com/story/edwards-resigns-dhs-oig-amid-allegations/2013-12-17 (last visited July 3, 2014).

[25] Recently, there have been multiple revelations of document destruction by Executive Branch agencies under congressional scrutiny. See Erica Martinson, *EPA joins IRS lost emails club*, POLITICO (Jun. 26, 2014, 4:39 PM), http://www.politico.com/story/2014/06/missing-government-emails-epa-108306.html; Rachael Blade, *Archivist: IRS did not follow law on lost emails*, POLITICO (Jun. 24, 2014, 4:31 PM), http://www.politico.com/story/2014/06/irs-lost-emails-archivist-108242.html And there have been no Section 1519 charges or prosecutions for any of these things.

investigation (conduct clearly covered by the statute) is reassigned, while a taxpayer who orders red grouper thrown overboard is imprisoned. This suggests that the statute is susceptible not only to misapplication, but selective enforcement. No system that treats government employees differently than average citizens engenders respect for the law. Moreover, differential treatment of taxpayers and government officials suggests that Section 1519 is so vague that prosecutors cannot apply it consistently.

Accordingly, this Court should reject any assurances from the government that it will use its discretion to carefully limit Section 1519's application to serious underlying crimes. Besides the fact that it is virtually impossible to closely monitor every federal prosecutor, this Court has repeatedly rejected similar promises. See, *e.g.*, *United States* v. *Alvarez*, 132 S. Ct. 2357 (2012) (rejecting, without comment, the government's argument assuring that the Stolen Valor Act would only be used in "carefully chosen prosecutions." Brief for the United States at 55, Alvarez, 132 S. Ct. 2357 (No. 11-210)); *cf. United States* v. *Stevens*, 559 U.S. 460, 480 (2010) (refusing to "uphold an unconstitutional statute merely because the Government promised to use it responsibly").

The Government further contends that concerns regarding Section 1519 prescribing harsh penalties for obstructive conduct related to relatively minor matters are overblown because courts have discretion to consider the gravity of underlying offense during sentencing. See Br. in Opp. of Cert. at 27-28. If the Government continues to press Section

1519's congressionally-defined limits as it did with Captain Yates, whether or not courts use discretion in sentencing is of little importance, because a potential felony conviction has serious consequences beyond length of sentence. First, being able to seek up to a 20-year prison sentence for a minor violation unjustly favors the prosecution. Defendants accused of relatively minor civil or criminal infractions risk extremely harsh prison terms and have a high incentive to accept a less-than-favorable plea deal—or even to plead guilty when innocent. See Larkin, *supra*, at 754 (noting that overcriminalization can lead "an innocent person to plead guilty to avoid long-term imprisonment); Brian Walsh & Benjamin Keane, *Overcriminalization and the Constitution*, THE HERITAGE FOUNDATION, Legal Memo. No. 64, Apr. 11, 2011, at 5 ("In the federal system, where over 95 percent of defendants already plead guilty, overcriminalization thus gives prosecutors vast latitude to secure guilty verdicts.").

Even when a person receives a relatively light prison sentence under Section 1519 for destroying evidence of a non-criminal offense, they still must deal with the harsh implications of being a convicted felon. Examples include ineligibility for public and private employment,[26] loss of the right to possess a

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[26] See, *e.g.*, Conn. Gen. Stat. § 21-40 ("No [pawnbroker] license shall be issued under this section by the licensing authority to any person who has been convicted of a felony."); *Id.* at § 29-145 ("No person who has been convicted of a felony shall be licensed to do business as a professional bondsman in this state."); NY CLS Bank § 599-e(b) ("[T]he superintendent shall not issue a mortgage loan origination license unless he or she makes, at a

firearm,[27] and voting restrictions.[28] These consequences further emphasize how the Government's construction is untenable and why this Court must properly confine the scope of Section 1519.

V. The Eleventh Circuit's Decision Ignores Captain Yates's Due Process Rights

The Eleventh Circuit's interpretation of Section 1519 converts otherwise clear statutory language into unconstitutionally vague language within the meaning of the Due Process Clause of the Fourteenth Amendment because the court applied Section 1519 in a way no person of ordinary intelligence could have foreseen. Criminal statutes must be

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minimum, the following findings: No felony conviction."); Deborah Simmons, *Former Felons Feel Boxed In By Crime Question*, The Washington Times, Aug. 15, 2010, http://www.washingtontimes.com/news/2010/aug/15/former-felons-feel-boxed-in-by-crime-question/?page=all (last visited July 3, 2014).

[27] 18 U.S.C. § 922(g)(1) (stating that it is unlawful for any person "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" to possess "any firearm or ammunition").

[28] *See, e.g.*, La. R.S. 18:102 ("No person shall be permitted to register or vote who is: Under an order of imprisonment, as defined in R.S. 18:2(8), for conviction of a felony."); Fla. Stat. § 97.041(b) ("The following persons, who might be otherwise qualified, are not entitled to register or vote: A person who has been convicted of any felony by any court of record and who has not had his or her right to vote restored pursuant to law."); Jotaka L. Eaddy, *Our Nation has a Secret: Felony Disenfranchisement in America*, THE HUFFINGTON POST (Dec 10, 2013, 9:54 AM), http://www.huffingtonpost.com/jotaka-l-eaddy/america-has-a-secret_b_4415993.html.

sufficiently clear so individuals are put on notice of what conduct is prohibited. "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States* v. *Harriss*, 347 U.S. 612, 617 (1954). "[A] penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983). Statutes lacking sufficient notice violate "the first essential of due process of law." *Connally* v. *Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). "We have often emphasized the need for clarity in the definition of criminal statutes, to provide 'fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed.'" *Hubbard* v. *United States*, 514 U.S. 695, 701 n.4 (1995) (quoting *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931)).

A statute that is otherwise clear and definite on its face runs afoul of due process requirements if it is applied in an unexpected manner. As this Court held in *Bouie* v. *City of Columbia*, "[t]here can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." 378 U.S. 347, 352 (1964); see also *Rabe* v. *Washington*, 405 U.S. 313 (1972) (reversing a conviction under a state obscenity law because it

rested on an unforeseeable judicial construction of the statute).

The inquiry here, therefore, is whether a person of ordinary intelligence is put on notice that throwing undersized fish overboard is a criminal violation under Section 1519. No person of ordinary intelligence could read Section 1519 and be put on notice that he or she could face up to twenty years in prison for throwing undersized fish overboard.

Because the entirety of Section 1519 concerns records, the only reasonable way to interpret Section 1519's use of the phrase "tangible objects" is that it refers to tangible objects that perform a record-keeping function, such as flash drives, hard-drives, or computers. Any other interpretation turns Section 1519 into nonsense. One can make a "false entry in" a document or a hard drive; one cannot make a "false entry in" a fish.

For all the reasons set forth above, Congress did not intend for Section 1519 to either prohibit or punish throwing fish overboard. But even if it had, the statute as written does not provide sufficient notice to ordinary citizens that such conduct is criminalized by Section 1519. Determining whether the constitutional "fair notice" requirement is met is somewhat different than the process of statutory construction to determine what a statute actually says. Compare *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983) (fair notice requires that a statute "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."), with

United States v. *Missouri Pac. Ry.*, 278 U.S. 269, 278 (1929) (if the plain language of a statute is clear, unambiguous, and does not lead to absurd results, then no further interpretation is required), and *Lancashire Coal Co.* v. *Sec'y of Labor, Mine Safety & Health Admin.*, 968 F.2d 388, 391 (3d Cir. 1992) ("[W]hen the statutory language is clear a court need ordinarily look no further.").

The "fair notice" inquiry looks to what an ordinary person would understand the statute to mean. Here, the language of the statute does not clearly prohibit the conduct in question. Further, the discussion in Congress and in the media at the time Sarbanes-Oxley was passed concerned accounting fraud, Enron, and document shredding. Section 1519 was described in the Senate Report as an "anti-shredding provision,"[29] and Sarbanes-Oxley as aiming "to prevent and punish corporate and criminal fraud, protect the victims of such fraud, preserve evidence of such fraud, and hold wrongdoers accountable for their actions."[30]

In discussing Section 1519, Senator Patrick Leahy stated "[t]he intent of the provision is simple; people should not be destroying, altering, or falsifying documents to obstruct any government function." Sen. Patrick Leahy, Statement, 148 Cong. Rec. S7418-19 (July 26, 2002).

Media coverage at the time of the passage of Sarbanes-Oxley did nothing to tip off Captain Yates

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[29] S. Rep. No. 107–146, at 14 (2002).

[30] *Id.*, at *1 (2002)

or anyone else that throwing undersized fish overboard could result in prosecution under that law. The *Wall Street Journal* wrote that "[p]remised on the notion that nothing concentrates the mind like the prospect of a hanging, Sarbanes-Oxley added penalties for corporate wrongdoing to a variety of regulatory initiatives already underway," and that the goal of the Act was "restoring investor confidence." Paul Maco, *You Can't Count on Laws To Restore Market Trust*, WALL ST. J., Aug. 6, 2002, http://online.wsj.com/news/articles/SB102857486314 6641600 (last visited July 3, 2014). *The New York Times* called Sarbanes-Oxley a "major *corporate* corruption law." Stephen Labaton, *Business: Will Reforms With Few Teeth Be Able to Bite?*, N.Y. TIMES, Sept. 22, 2002, http://www.nytimes.com/ 2002/09/22/business/business-will-reforms-with-few-teeth-be-able-to-bite.html (last visited July 3, 2014) (emphasis added). The *Chicago Tribune* wrote "[i]n July, after WorldCom's implosion in a massive accounting fraud and a parade of other business scandals, Congress enacted legislation to combat corporate corruption." Michael Orey, *WorldCom-Inspired Law Has Some Flaws*, CHI. TRIB., Oct. 9, 2002, http://articles.chicagotribune.com/2002-10-09/business/0210090046_1_sarbanes-oxley-act-retaliation-claim-new-law (last visited July 3, 2014). In this atmosphere, no citizen could be expected to read the statute and believe that Section 1519 applies to the conduct at issue here.

This Court's decision in *McBoyle*, 283 U.S. at 27, is instructive. In that case, the defendant appealed his conviction under the National Motor Vehicle Theft Act for interstate transport of a stolen

airplane. The Act covered only "motor vehicles," defined as "an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails." The Court ruled for the defendant. As Justice Holmes wrote:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world, in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible, the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon the speculation that, if the legislature had thought of it, very likely broader words would have been used.

McBoyle, 283 U.S. at 26-27. Here, the rule of conduct laid down evokes in the common mind (and, as the statutory history makes clear, in the congressional "mind" as well) "only the picture" of document shredding and financial fraud and not throwing red grouper overboard. The statute should not be extended.

Statutory context, plain language, legislative history and contemporaneous statements make it clear that Congress did not conceive Section 1519

would implicate, prohibit or punish a commercial fisherman throwing undersized fish overboard, much less that Congress intend it to do so. Congress did not put individuals in Yates's position on fair notice that such conduct was, in the wake of Enron's financial fraud, a violation of Section 1519. Accordingly, Section 1519 is unconstitutionally vague as applied.

CONCLUSION

For the foregoing reasons, the Eleventh Circuit's judgment upholding Petitioner Yates's conviction under Section 1519 should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

JOHN L. YATES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA & NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

BACKGROUND AND SUMMARY OF ARGUMENT . 2

ARGUMENT 6

I. Familiar Tools of Statutory Interpretation Confirm that Section 1519 Does Not Extend to Petitioner's Fish. 6

A. Read in Context, "Tangible Object" Refers to Record-Keeping Devices, Not the Actual Inventory of Goods that Are the Subject of Businesses' Accounts and Records. 7

B. If Any Ambiguity Remains, Legislative History and Practical Effects Illustrate that Congress Could Not Have Intended Respondents' Interpretation. 13

II. Section 1519 Is an Important and Workable Provision of Sarbanes-Oxley when Construed Properly as Urged Here. 18

CONCLUSION 21

TABLE OF AUTHORITIES

Page(s)

Cases

Arthur Andersen LLP v. United States,
544 U.S. 696 (2005) 5

BedRoc Ltd. v. United States,
541 U.S. 176 (2004) 14

Bond v. United States,
134 S. Ct. 2077 (2014) 10, 13, 14

Clark v. Martinez,
543 U.S. 371 (2005) 16

Clinton v. City of New York,
524 U.S. 417 (1998) 18

Dowling v. United States,
473 U.S. 207 (1985) 13

Edelman v. Lynchburg College,
535 U.S. 106 (2002) 13

Free Enter. Fund v. Public Co. Accounting Oversight Bd.,
130 S. Ct. 3138 (2010) 3

Gustafson v. Alloyd Co.,
513 U.S. 561 (1995) 8, 9

Krause v. Titleserv, Inc.,
402 F.3d 119 (2nd Cir. 2005) 21

Lawson v. FMR LLC,
134 S. Ct. 1158 (2014) 14, 15

Lowe v. SEC,
472 U.S. 181 (1985) 11

Paroline v. United States,
134 S. Ct. 1710 (2014) 8

Porter v. Nussle,
534 U.S. 516 (2002) 11

Sandifer v. U.S. Steel Corp.,
134 S. Ct. 870 7

Taniguchi v. Kan Pacific Saipan, Ltd.,
132 S. Ct. 1997 (2012) 10

Third Nat'l Bank in Nashville v. Impac Ltd.,
432 U.S. 312 (1977) 8

United States v. Atkinson,
2012 WL 3206446 (S.D. Ala. Aug. 7, 2012) 20

United States v. Atl. States Cast Iron Pipe Co.,
612 F. Supp. 2d 453 (D.N.J. 2009) 19

United States v. Cook,
384 U.S. 257 (1966) 6

United States v. Giuseppe Bottiglieri Shipping Co., S.P.A., No. 12-0057, 2012 WL 1899844
(S.D. Ala. May 24, 2012) 19

United States v. Gray,
692 F.3d 514 (6th Cir. 2012) 18

United States v. Hunt,
526 F.3d 739 (11th Cir. 2008) 15

United States v. Kernell,
667 F.3d 746 (6th Cir. 2012) 18

United States v. Morton,
467 U.S. 822 (1984) 7

United States v. Perez,
603 F.3d 44 (D.C. Cir. 2010) 19

United States v. Reeves,
2012 WL 1909350 (D.N.J. May 25, 2012) 13

United States v. Russell,
639 F. Supp. 2d 226 (D. Conn. 2007) 20

United States v. Smyth,
213 F. App'x 102 (3d Cir. 2007) 20

United States v. Vosburgh,
602 F.3d 512 (3d Cir. 2010) 19, 20

United States v. Williams,
553 U.S. 285 (2008) 8

United States v. Wortman,
488 F.3d 752 (7th Cir. 2007) 19, 20

United States v. Yates,
733 F.3d 1059 (11th Cir. 2013) 10

Statutes

18 U.S.C. § 1519 ..... passim

18 U.S.C. § 2232(a) 12

Pub. L. No. 107-204, 116 Stat. 745 ..... 3, 11

S. Rep. No. 107-146 (2002) 5

Other Authorities

148 Cong. Rec. S7418 (2002)
(daily ed. July 26, 2002) 5, 6

Dick Carozza, *An Interview with Sen. Paul S. Sarbanes: Sarbanes-Oxley Revisited* (May/June 2007), available at http://www.fraud-magazine.com/article.aspx?id=442 3

Elisabeth Bumiller, *Corporate Conduct: The President; Bush Signs Bill Aimed at Fraud In Corporations*,
The New York Times (July 31, 2002) 3

S. Rep. 107–146 14

Pursuant to this Court's Rule 37.2, *amici curiae* the Chamber of Commerce of the United States of America ("the Chamber") and the National Association of Manufacturers ("NAM") respectfully file this brief in support of Petitioner.*

INTEREST OF *AMICI CURIAE*

Founded in 1912, the Chamber is the world's largest business federation, representing approximately 300,000 members and indirectly representing the interests of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. Its membership includes businesses subject to regulation under the Sarbanes-Oxley Act, including the requirement, codified at 18 U.S.C. § 1519, that prohibits the destruction of records after a federal investigation has commenced. The scope of this law potentially concerns many, if not all, of the Chamber's members, especially to the extent it reaches beyond the financial and accounting sectors.

The National Association of Manufacturers ("NAM") is the largest association of manufacturers in the United States, representing small and large manufacturers in every industrial sector and in all 50 States. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion

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* The United States has consented to the filing of this *amicus* brief and, pursuant to Rule 37.3, a letter evidencing that consent has been filed with the Clerk. In accordance with Rule 37.6, both *amici* hereby state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation or submission of this brief.

to the American economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. NAM advocates for sensible approaches to the law that help manufacturers compete in the global economy and create jobs across the United States. The law at issue in this case is directly relevant to NAM's members, particularly with respect to the management of their inventories.

BACKGROUND AND SUMMARY OF ARGUMENT

Section 1519 covers business records in a variety of forms — whether traditional paper documents or computer hard drives — but it does not cover fish. Statutory construction relies on the accumulated wisdom in interpretive canons and commonsense rules for reading words in context. Here, these guideposts lead to a reading that, in the context of the statute as a whole, allows Section 1519's prohibition on destroying, altering or concealing false entries in a "tangible object" to mean only those objects used for business record-keeping. The more expansive reading adopted in the court below shuns conventional tools of construction and threatens substantial penalties without a limiting principle in sight. One result of a such a sweeping interpretation of "tangible object" could be an equally sweeping reaction from businesses, which would understandably pivot away from beneficial practices to avoid destroying any physical thing, even when doing so is in the public interest and would involve nothing improper. This is not the course that Congress charted in passing Section 1519.

Congress enacted the Sarbanes-Oxley Act of 2002 to protect investors in public companies "[a]fter a

series of celebrated accounting debacles." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3146 (2010); *see also* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (title). Predictably, those "debacles" shone a bright light on the Securities and Exchange Commission ("SEC") and its ability to punish deceptive accounting practices. In crafting Sarbanes-Oxley, Congress attempted to fill a perceived gap in the SEC's enforcement powers, enlisting criminal sanctions to strengthen the deterrence of problematic corporate behavior.

Enhanced enforcement was not a stealth component of the new law. Businesspeople and politicians alike expressed views about Sarbanes-Oxley and its tools for punishing dishonest record-keeping, of which Enron and WorldCom were the most notorious practitioners. The Act's namesake Senator said that "It addressed the crisis of investor confidence. It's brought about a number of marked improvements in corporate accountability." Dick Carozza, *An Interview with Sen. Paul S. Sarbanes: Sarbanes-Oxley Revisited* (May/June 2007) (interviewing Sen. Paul S. Sarbanes), available at http://www.fraud-magazine.com/article.aspx?id=442. In signing the bill, then-President George W. Bush made no reference to any generalized expansion of law enforcement tools, and certainly not to fishing regulations, but instead noted the core concerns after the accounting scandals: "No boardroom in America is above or beyond the law." Elisabeth Bumiller, *Corporate Conduct: The President; Bush Signs Bill Aimed at Fraud In Corporations*, The New York Times (July 31, 2002).

Among its specific objectives, Sarbanes-Oxley addressed a narrow but vital issue in the corporate world: alteration and even destruction of business records. The collapse of Enron and WorldCom, along with allegations of record tampering at other public companies, heightened the concerns about the need to prevent the withholding or destroying of corporate documentation. This objective fit with the larger goal of Sarbanes-Oxley "[t]o protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws . . . ." *See* Preamble, Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

To enable that protection, Congress enacted 18 U.S.C. § 1519, which provides:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

Put more simply, the provision, where it applies, prohibits the spoliation of corporate record-keeping related to an investigation by the United States and ramps up the penalties to which spoliators are subject.

This statutory remedy arose from and responded to frustration on the part of legislators and, importantly, investors. In the late 1990s, when government agencies charged with protecting investors turned to prosecuting corporate culprits, they found instances of hiding or destroying evidence to be especially problematic. The most visible example was the litigation surrounding Enron's auditor, Arthur Andersen LLP ("Andersen"), which culminated in this Court's decision in *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005). With the collapse of a client unfolding and an SEC investigation looming, Andersen executives began destroying corporate documents. Andersen management issued several reminders to its staff to "ensure team members were complying with the document policy," which "were followed by substantial destruction of paper and electronic documents." *Id.* at 701.

Although the Court eventually reversed Arthur Andersen's criminal conviction, Andersen's highly publicized conduct and the frustration of enforcement officials did not go unnoticed on Capitol Hill. In fact, Senator Leahy, who authored Title VIII of the Act, bemoaned "the apparent massive document destruction by Andersen and the company's seemingly misleading document retention policy," as well as the ostensible inadequacy of the existing obstruction of justice statutes to deal with that situation. *See* 148 Cong. Rec. S7418, S7419 (2002) (daily ed. July 26, 2002) (statement of Sen. Leahy). The Senate Committee Report states "the current laws regarding destruction of evidence are full of ambiguities and limitations that must be corrected." S. Rep. No. 107-146, at 7 (2002). The report

concluded that statutory changes were necessary in this particular context to ensure that "[w]hen a person destroys evidence with the intent of obstructing any type of investigation and the matter is within the jurisdiction of a federal agency, overly technical distinctions [will] neither hinder nor prevent prosecution and punishment." *Id.*

No one disputes that Enron's records were a scandal. Moreover, given the centrality of honest and accurate corporate records to a functioning securities market, the tools that Congress provided, including Section 1519, are understandable. Yet, even the best tool for the most important job can become a hazard when misapplied.

As set out below, in Section 1519, Congress added a supplemental tool for curtailing financial and accounting fraud. Unfortunately, the court below has construed it so broadly as to punish even small-scale fishermen for throwing undersized groupers back into the Gulf of Mexico. That construction has important and harmful reverberations for the business community at large and is simply a mistaken reading of the statutory text.

ARGUMENT

I. Familiar Tools of Statutory Interpretation Confirm that Section 1519 Does Not Extend to Petitioner's Fish.

Because it threatens fines and imprisonment — a violator "***shall*** be fined under this title, imprisoned not more than 20 years, or both" — Section 1519 already carries a presumption of narrow construction. *United States v. Cook*, 384 U.S. 257, 262 (1966) (noting "the maxim that penal statutes should be strictly construed."). Other canons of interpretation

confirm that, under an appropriately strict construction of the law, the term "tangible object" applies only to objects used for storing business records.

A. Read in Context, "Tangible Object" Refers to Record-Keeping Devices, Not the Actual Inventory of Goods that Are the Subject of Businesses' Accounts and Records.

The key term at issue in this case — "tangible object" — is the final item in a three-element list: "record, document, or tangible object." 18 U.S.C. § 1519. It is part of a larger statute enacted to prevent the destruction of corporate records used for investor disclosures.

It is axiomatic that to give statutory language its ordinary meaning, courts consider the context in which it appears. This approach leads to canons of interpretation and structural clues that inform what can otherwise be an overly rigid dependency on the dictionary. Here, instead of reading the text in context, the Eleventh Circuit erred in reading "tangible object" in a vacuum so tight that it excluded even the other words of Section 1519 itself.

As this Court recently reiterated, the "ordinary meaning" of words depends on both text and context. *Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 877 (2014) ("Nothing in the text or context of § 203(o) suggests anything other than the ordinary meaning of 'clothes'"). Thus, when determining the meaning of individual words, whether "clothes" in *Sandifer* or "tangible object" here, "[w]e do not . . . construe statutory phrases in isolation; we read statutes as a

whole." *United States v. Morton*, 467 U.S. 822, 828 (1984).

1. One mechanism through which the law has operationalized the importance of context is the *noscitur a sociis* interpretive canon. In its simplest form, the canon mandates that "words grouped in a list should be given related meaning." *Third Nat'l Bank in Nashville v. Impac Ltd.*, 432 U.S. 312, 322 (1977). Or, in a more faithful translation, "a word is known by the company it keeps." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995). However expressed, the canon's purpose is to narrow the universe of meanings that could attach to statutory text. *Id.* (explaining that the canon serves to avoid "giving unintended breadth to the Acts of Congress") (quotation omitted). *Gustafson* is an illustrative precedent. There, the Court explained that "the term 'written communication' must be read in context to refer to writings that . . . are similar to the terms 'notice, circular, [and] advertisement,'" which appeared in the same list. *Id.* at 576. Thus, the word communication applied only to a subset of what the dictionary would sweep within that term, namely those "communications held out to the public at large but that might have been thought to be outside the other words in the definitional section." *Id.*; *see also Paroline v. United States*, 134 S. Ct. 1710 (2014) (applying the requirement of proximate causation, which appeared in only one item in a list, to all other listed injuries); *United States v. Williams*, 553 U.S. 285, 294-95 (2008) (interpreting "promotes" and "presents" to apply only to commercial transactions based on neighboring terms).

Here, the interpretive project is straightforward. As noted, the term at issue in this case — "tangible

object" — is the final item in a three-element list: "record, document, or tangible object." 18 U.S.C. § 1519. The plain meanings of "record" and "document" have a common focus on preserved information, and "tangible object" should be construed likewise, by applying it to record-keeping and data storage devices, and not to physical inventories. Record-keeping devices are "tangible objects", and they store accounts and records, which is why such an interpretation makes sense, while physical inventories do not.

Just as *Gustafson* read the word "communication" to exclude in-person communications (despite a dictionary definition that was sufficiently broad to include person-to-person discussions), so, too, should "tangible object" absorb a narrower meaning from its neighbors. Understood not in isolation but as an element of a list, "tangible object" refers to objects used to keep business records. The most natural application of this definition is to electronic storage devices, which is precisely what the lower courts (and most prosecutors) have done. *See infra* Part II. Because the universe of electronic storage is ever-changing, the drafters of Section 1519 could not have enumerated the specific devices that fall within the provision. Whether compact discs, DVDs, hard drives, flash drives or other means of storage, no sooner would the drafters of the law have issued their list than a new form of data storage would emerge and render the law obsolete. "Tangible object" captures all of these devices, while limited by its record-keeping context.

2. Ordinary meaning is therefore informed by — but different from — a pure dictionary definition. *See, e.g., Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct.

1997, 2003 (2012) (rejecting a dictionary definition as more broad than how the word is "ordinarily understood"). Just last Term, this Court demonstrated that a statutory interpretation derived from the dictionary can expand a statute well beyond the words' ordinary usage. *Bond v. United States*, 134 S. Ct. 2077, 2091 (2014) (""We are reluctant to ignore the ordinary meaning of 'chemical weapon' when doing so would transform a statute passed to implement the international Convention on Chemical Weapons into one that also makes it a federal offense to poison goldfish.").

Reliance on isolated dictionary definitions to the exclusion of context is the first and most important error in the lower court's reasoning. The Eleventh Circuit treated in a single paragraph the Sarbanes-Oxley charges against Petitioner. *United States v. Yates*, 733 F.3d 1059, 1064 (11th Cir. 2013). That court correctly noted that statutory text is paramount. *Id.* Where the court deviated from the worn interpretive path, however, was in concluding that fidelity to the text was equivalent to adopting the dictionary definition of "tangible." As the examples above illustrate, that approach does not honor the ordinary meaning in cases like this one. In *Taniguchi*, for example, the Court recognized that the denotative definition of "interpreter" could encompass professional translators as well, but its analysis did not stop there: "That a definition is broad enough to encompass one sense of a word does not establish that the word is ordinarily understood in that sense." 132 S. Ct. at 2003. Instead, as here, the ordinary meaning includes consideration of context.

3. Moreover, reading the term "tangible object" in context to encompass devices on which business

records are kept prevents a second error made by the Eleventh Circuit in transgressing another important canon of interpretation — the prohibition on rendering statutory language superfluous. *Lowe v. SEC*, 472 U.S. 181, 207 n.53 (1985) ("[W]e must give effect to every word that Congress used in the statute."). While disagreement might arise over whether a computer hard drive, for example, is a "record," there can be no doubt that it is a tangible object capable of storing electronic records and documents, as well as raw data and other materials that might be essential to prosecutions under Sarbanes-Oxley.

4. Beyond the canons of interpretation, structural clues in the statute further confirm that Section 1519 applies only to record-keeping devices and not to other physical evidence.

The title of Section 1519 reads: "Destruction, alteration, or falsification of ***records*** in Federal investigations and bankruptcy." 18 U.S.C. § 1519 (emphasis added). Importantly, this title appeared in the bill on which Congress voted, not a later editorial addition by the codifier. *See* Pub. L. 107-204, tit. VIII, § 802(a). While less powerful than the *noscitur a sociis* doctrine, "[t]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." *Porter v. Nussle*, 534 U.S. 516, 527-28 (2002) (quotation omitted). Consistent with a contextual reading of the provision, this title focuses on record-keeping rather than spawning a limitless penalty for destruction or falsification of anything in the three-dimensional universe. At the very least, inventories like Petitioner's fish, which might be evidence and therefore covered by general spoliation laws, are

certainly not records within the coverage of Sarbanes-Oxley.

In this way, Section 1519 is a penal provision, but it does not criminalize activities that were previously licit. Spoliation was illegal in every jurisdiction long before Sarbanes-Oxley. As traced above, Sarbanes-Oxley's contribution is clarified coverage of ***business records*** and enhanced penalties, including imprisonment up to 20 years, as a mechanism for discouraging the sham record-keeping that magnified investors' losses at the end of the 1990s.

The present case illustrates how Section 1519 raises penalties. Petitioner was convicted under the general anti-spoliation provision in 18 U.S.C. § 2232(a). That provision penalizes the destruction of property "for the purpose of preventing or impairing the Government's lawful authority to take such property into its custody or control." *Id.* It carries the possibility of fines and a prison sentence of up to five years. *Id.* Petitioner was convicted under that provision, and that conviction is not subject to further review here.

But the Petitioner was also convicted under Section 1519, in a ruling below that simultaneously expands Sarbanes-Oxley and renders the separate Section 2232(a) nearly superfluous, eschewing a construction that makes the statutes work in tandem. Instead, Section 1519's penalty-enhancing purpose should fit within this Court's commitment "strictly to determine the scope of the conduct the enactment forbids." *Dowling v. United States*, 473 U.S. 207, 213 (1985); *see also United States v. Reeves*, 2012 WL 1909350, at *12 (D.N.J. May 25, 2012) (relying on *Dowling* to refuse application of Section 1519 where a different statute already criminalized the conduct in

question). When Congress acted in 2002 to increase the penalties for financial legerdemain, it did so with the expectation that courts would not stretch its words to produce excessive penalization. *See, e.g.*, *Edelman v. Lynchburg College*, 535 U.S. 106, 117 n.13 (2002) (the Court "presume[s] that Congress was thoroughly familiar with our precedents and that it expects its enactments to be interpreted in conformity with them." (modifications omitted)).

As demonstrated above and in Petitioner's brief, "tangible object" read in context extends only to objects used in keeping business records. This reading alone is consistent with Section 1519 as a whole.

B. If Any Ambiguity Remains, Legislative History and Practical Effects Illustrate that Congress Could Not Have Intended Respondents' Interpretation.

The decision below suffers from another affliction: it runs contrary to congressional intent. This is apparent not only in the history of the Sarbanes-Oxley Act, but also in the harmful consequences for businesses throughout the United States that would follow from the lower court's decision.

1. In *Bond*, the Court reasoned that an "ambiguity derives from the improbably broad reach of the key statutory definition given the term — 'chemical weapon' — being defined." 134 S. Ct at 2090. A similar, "improbably broad" definition of a key statutory term is at the center of this case. This Court has noted its "longstanding precedents that permit resort to legislative history only when necessary to interpret ambiguous statutory text."

BedRoc Ltd. v. United States, 541 U.S. 176, 187 n.8 (2004). As understood by the Eleventh Circuit, Section 1519 might extend to literally every object in the physical world (plus, one must presume, "documents" and "records" that exist only in intangible form). Since it is hard to imagine how a statute could have more sweeping scope, the term appears "improbably broad" and therefore mirrors the ambiguity identified in *Bond*.

2. The legislative history of Sarbanes-Oxley confirms that Congress's evidence-preservation objective was always confined to financial records. Congress enacted Section 1519 to "close loopholes in the existing criminal laws relating to the destruction or fabrication of evidence and the preservation of financial and audit records." S. Rep. 107–146, at 14. The Report continues to enumerate the destruction to which Section 1519 applies: "systematic destruction of records apparently extended beyond paper records and included efforts to purge the computer hard drives and E-mail system of Enron related files." *Id.* at 4 (quotation omitted). The Senate Report's distinction between, on the one hand, "paper records" and, on the other, "computer hard drives and E-mail system[s]" confirms the interpretation of "tangible objects" as a reference to the ever-expanding universe of devices that store electronic records.

The statute's roots in financial and accounting fraud are readily apparent. In fact, this Court engaged in that very exercise just last term. *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014). *Lawson* concerned the whistleblower provision in Sarbanes-Oxley, but the legislative history that informed that decision applies here as well. For example, the Court noted the statute's genesis in the Enron scandal and

cited the Senate Report over a dozen times. *See id.* at 1169-70. Even the Eleventh Circuit, with its peculiarly sweeping view of Section 1519, concedes that Congress created the provision to target corporate fraud. *United States v. Hunt*, 526 F.3d 739, 744 (11th Cir. 2008) (holding that Section 1519 applies beyond the "corporate fraud and executive malfeasance" that "***prompted legislative action***" (emphasis added)).

Conversely, applying the lower court's interpretation to the scandals that spawned Sarbanes-Oxley shows a mismatch between the Eleventh Circuit's view of the law and the obstacles that frustrated prosecutors. It was not the consumption of Enron's natural gas or the sale of WorldCom's fiber optic cables that robbed investors of their savings and prevented regulators from doing their job. Rather, it was only inaccurate corporate records that had these effects and, in turn, prompted Congress to respond.

Committee Reports and historical context thus confirm the contextual reading of "tangible objects" to focus on the record-keeping and data-storage concerns that drove the enactment of Sarbanes-Oxley in the first place.

3. Similar corroboration appears in the ***practical consequences*** of adopting Respondent's position. These consequences, like legislative history, are not necessary to resolve this case, but they are useful in the event that the Court finds the textual argument inconclusive. *See, e.g., Clark v. Martinez*, 543 U.S. 371, 380 (2005) ("[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice."). As if the facts of Petitioner's case did not

already illustrate the folly in the government's reading of Section 1519, the Chamber, NAM, and their members are concerned about further risks to public health, the environment and the American economy if that flawed interpretation survives. The necessary consequences of sweeping Petitioner's fish within Sarbanes-Oxley include heavy compliance costs for American businesses and risks for the public generally. Indeed, the Eleventh Circuit's capacious reading could expose companies to significant liability for otherwise run-of-the-mill inventory management in situations where the company faces an investigation that is expressly or even tangentially related to its inventory. For a few examples:

- A consumer-products company faces allegations of tainted products and, under the Eleventh Circuit's reading, potentially must retain not only its records but its entire inventory — not just samples for testing — for the duration of the federal investigation. Doing so requires halting production of new wares or doubling warehouse costs.
- A chemical company sustains a spill and must delay or vary its response to avoid destroying or altering the spilled chemicals, which may be "tangible objects" in the Eleventh Circuit's understanding.
- A commercial butcher, subject to FDA regulation, discovers that it has sold contaminated meat. Because meat may be a "tangible object" in the Eleventh Circuit's view, the butcher cannot advise consumers to discard the product (*i.e.*, destroy it), the company risks that consumers misunderstand the danger and possibly continue eating the contaminated meat.

- An automobile dealership that depends on factory financing to maintain an inventory of cars and trucks learns that federal authorities are investigating its franchisor. As construed by the court below, the entire inventory of vehicles may represent "tangible objects" that cannot be sold, bringing the dealer's business to a halt.
- A high-end retailer that regularly removes brand designations and donates unsold products at the end of a season faces a Customs dispute. Even if the company has accurate records of all garments thus "alter[ed]," it nevertheless may be in violation of Section 1519, according to the court below.

As these examples demonstrate, the government's reading of Section 1519 has consequences beyond scholarly debate over how to read a statute. It threatens every corner of the American economy, often with perverse consequences for other facets of life as well. Retaining, without "alter[ing]" or "destroy[ing]," entire inventories of goods visits an extraordinary burden on businesses, and for no valid reason under the statute.

4. The Court should not assume that Congress endorsed these consequences when passing a law in response to a specific type of misconduct. When one possible interpretation of a statute "would produce an absurd and unjust result which Congress could not have intended," the Court should follow an alternative reading. *Clinton v. City of New York*, 524 U.S. 417, 429 (1998). Here, as in *Clinton*, "[t]here is no plausible reason" that Congress would have buried an unlimited prohibition on the disposal of business inventories in a law targeted to fraud in the ***records*** of companies in the financial and accounting fields.

The consequences of an interpretation that brings Petitioner's fish within Sarbanes-Oxley demonstrate that Congress could not have intended the outcome created by the Eleventh Circuit. These factors thus confirm the message of the legislative history and the text of the statute itself.

II. Section 1519 Is an Important and Workable Provision of Sarbanes-Oxley when Construed Properly as Urged Here.

Reading the term "tangible object" to encompass only data-storage and other record-keeping devices does not undermine the objectives of Sarbanes-Oxley. Courts around the country have proven as much. Without allowing the statute to balloon in the way that the Eleventh Circuit has, they have used Sarbanes-Oxley to punish missing hard drives, deleted computer files and destroyed external storage devices. The statute need not catch fish in order to catch criminals.

Courts adopting Petitioner's more natural and restrained interpretation of the statute have used Section 1519 to reach an array of evidence-destroying conduct. *See, e.g., United States v. Gray*, 692 F.3d 514, 519-20 (6th Cir. 2012) (applying § 1519 to omission in correctional officer's incident reports); *United States v. Kernell*, 667 F.3d 746, 750 (6th Cir. 2012) (upholding defendant's conviction under § 1519 for deleting information on a computer); *United States v. Wortman*, 488 F.3d 752, 754-55 (7th Cir. 2007) (affirming conviction of girlfriend punished for breaking compact disc containing child pornography).

In opposing *certiorari*, the United States cited cases purportedly supporting the Eleventh Circuit's expansive reading of Section 1519. *See* Br. for the

United States at 13-14. Upon examination, these cases fall into two groups: (1) those that do not address the scope of Section 1519 at all, and (2) those that interpret "tangible object" consistently with Petitioner's view. Of the former group, *United States v. Perez*, 603 F.3d 44 (D.C. Cir. 2010), is typical. The court in *Perez* affirmed a plea agreement without ever considering whether Section 1519 extended to the defendant's action of washing cocaine down the sink. *Id.* at 45. While an inventory of cocaine would come close to mirroring Petitioner's inventory of noncompliant fish, the D.C. Circuit never adopted that interpretation. *See also United States v. Vosburgh*, 602 F.3d 512, 525 (3d Cir. 2010) (not reaching the Sarbanes-Oxley count because defendant was ***acquitted*** of destroying evidence in violation of Section 1519); *United States v. Giuseppe Bottiglieri Shipping Co., S.P.A.*, No. 12-0057, 2012 WL 1899844, at *2 (S.D. Ala. May 24, 2012) (upholding the sufficiency of an indictment on two grounds unrelated to Section 1519); *United States v. Atl. States Cast Iron Pipe Co.*, 612 F. Supp. 2d 453, 456-57 (D.N.J. 2009) (saying nothing about the jury's conviction of the defendant under Section 1519).

The second type of cases identified by the United States only confirm that "tangible object" extends to some items that would otherwise lie beyond the statute's reach because they are not obviously "documents" or "records." In each case, the evidence at issue would come within the interpretation of "tangible object" urged by Petitioner. *E.g., Wortman*, 488 F.3d at 755 (applying Section 1519 to a compact disk); *Vosburgh*, 602 F.3d at 525 (noting that prosecutors charged the defendant with destroying computer hard drives). The same pattern also

emerges in the few lower court opinions that argue — in *dicta* — for a more sweeping interpretation of the statute. *See United States v. Russell*, 639 F. Supp. 2d 226, 237-38 (D. Conn. 2007) (rejecting Petitioner's position, but in a case concerning the destruction of a laptop computer).

The government's inability to identify courts outside the Eleventh Circuit that construe Section 1519 to reach non-record-keeping contraband is telling. It testifies to the apparent consensus among lower courts that Sarbanes-Oxley can accomplish its investor-protection purpose without becoming another all-purpose anti-spoliation statute.

Just as significant is that numerous courts have relied on Section 1519's "tangible object" language to bring electronic storage media within the scope of the provision in the way Petitioner's reading would support. *E.g., Wortman*, 488 F.3d at 755 (compact disc); *United States v. Smyth*, 213 F. App'x 102 (3d Cir. 2007) (computer hard drive); *United States v. Atkinson*, 2012 WL 3206446, at *2 (S.D. Ala. Aug. 7, 2012) (digital video recorder (DVR) hard drive). These cases are especially illustrative because they concern the destruction of storage ***devices***, rather than ***files*** stored on those devices. While a file itself might constitute a "record" or "document," the device on which it is stored belongs to neither definition. This insight is a full response to the allegations of superfluousness in the *Russell dicta*. The inclusion of "tangible object" is not redundant because it encompasses storage devices that are not themselves documents or records. At the very least, it clarifies that such devices are within the reach of Section 1519, which can suffice to avoid violating the canon. *Krause v. Titleserv, Inc.*, 402 F.3d 119, 127-28 (2nd

Cir. 2005) ("Some repetition can help clarify the meaning of a statute, and we are reluctant to endorse an awkward reading of its words for no better reason than to satisfy the canon of construction that cautions against adopt[ing] a construction making another statutory provision superfluous." (quotation omitted)). Doing so also enables Section 1519 to supplement Section 2232 for a specific purpose, rather than rendering the latter a weaker and superfluous tool relative to the former.

Precedent in the lower courts — including that cited by the United States in opposition to *certiorari* — confirms that Section 1519 plays the important role of bringing electronic storage devices within the protective scope of Sarbanes-Oxley. In context, Petitioner is correct that Section 1519's reference to "tangible objects" in conjunction with "documents" and "records" plainly refers to record-keeping devices. That is the proper and correct construction, and the provision needs no judicial embellishment or expansion to fulfill that role.

CONCLUSION

Respondent's interpretation of Section 1519 is beyond what Congress intended in enacting Sarbanes-Oxley, misreads the text in its context, and would impose significant burdens on the business community, with obvious harm to our national economy. Thankfully, familiar tools of statutory interpretation avoid this outcome by confining "tangible objects" in context to record-keeping devices rather than entire physical inventories. For these reasons, as well as those set forth in Petitioner's brief, the judgment in this case should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

JOHN L. YATES, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR EIGHTEEN CRIMINAL LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the anti-shredding provision of Sarbanes-Oxley, 18 U.S.C. § 1519, which criminally prohibits the knowing concealment, alteration, or destruction of "any record, document, or tangible object" with the intent to impede a federal investigation, applies to a fisherman who throws undersized grouper into the ocean to avoid sanction under civil fishing regulations.

TABLE OF CONTENTS

Page(s)

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION AND INTEREST OF *AMICI CURIAE* 1

STATEMENT 4

SUMMARY OF ARGUMENT 6

ARGUMENT 9

I. The federal criminal code has grown vastly to include many redundant and vague criminal provisions that permit prosecution of a wide range of conduct 9

A. The sheer quantity of federal crimes has created an overbroad and largely redundant "code." 11

B. Many federal criminal laws, and the code as a whole, are unclear 15

II. This Court should address these problems of redundancy and vagueness by construing criminal statutes strictly—as required by fundamental, constitutionally driven interpretive principles. 18

III. The Government's boundless interpretation of the anti-shredding provision flouts the strict construction required here. 22

A. No interpretation of "tangible object" in the context of § 1519, much less the required strict interpretation, can reasonably include fish. 22

B. Under the canon of *ejusdem generis*, the term "tangible object" must refer to something similar to a "record" or a "document"—which does not include fish. 26

C. The history and purpose of Sarbanes-Oxley further undermine the Government's definition of "tangible object." 31

D. The rule of lenity likewise compels a narrow construction of the anti-shredding provision. 33

CONCLUSION 35

APPENDIX A1

TABLE OF AUTHORITIES

Page(s)

CASES

Abuelhawa v. *United States*,
556 U.S. 816 (2009) 26

Arthur Andersen LLP v. *United States*,
544 U.S. 696 (2005) 32

Barber v. *Thomas*,
560 U.S. 474 (2010) 33

Begay v. *United States*,
553 U.S. 137 (2008) 16, 23–24, 27–29

Bond v. *United States*,
134 S. Ct. 2077 (2014) 21

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378 U.S. 347 (1964) 17

Boyle v. *United States*,
556 U.S. 938 (2009) 16

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553 U.S. 639 (2008) 16

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501 U.S. 129 (1991) 26

Caron v. *United States*,
524 U.S. 308 (1998) 16

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533 U.S. 158 (2001) 16

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555 U.S. 122 (2009) 16

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532 U.S. 105 (2001) 27, 30

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531 U.S. 12 (2000) 33

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269 U.S. 385 (1926) 19

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133 S. Ct. 2276 (2013) 16

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529 U.S. 120 (2000) 22

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130 S. Ct. 3138 (2010) 31

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492 U.S. 229 (1989) 16

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50 U.S. (9 How.) 372 (1850) 21

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495 U.S. 411 (1990) 27

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134 S. Ct. 1158 (2014) 31

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283 U.S. 25 (1931) 2, 19, 27–29, 34

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131 S. Ct. 2218 (2011) 16

Moskal v. *United States*,
498 U.S. 103 (1990) 19, 32

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510 U.S. 249 (1994) 16

Neder v. *United States*,
527 U.S. 1 (1999) 20

Pa. Dep't of Pub. Welfare v. *Davenport*,
495 U.S. 552 (1990) 22

Ratzlaf v. *United States*,
510 U.S. 135 (1994) 23

Reves v. *Ernst & Young*,
507 U.S. 170 (1993) 16

Salinas v. *United States*,
522 U.S. 52 (1997) 16

Sekhar v. *United States*,
133 S. Ct. 2720 (2013) 20

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544 U.S. 13 (2005) 16

Skilling v. *United States*,
561 U.S. 358 (2010) 19, 33

Staples v. *United States*,
511 U.S. 600 (1994) 35

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131 S. Ct. 2267 (2011) 15–16

Taylor v. *United States*,
495 U.S. 575 (1990) 16

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404 U.S. 336 (1971) 21

United States v. *Birbal*,
113 F.3d 342 (2d Cir. 1997) 24

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380 U.S. 157 (1965) 27

United States v. *Coleman*,
148 F.3d 897 (8th Cir. 1998) 25

United States v. *Dotterweich*,
320 U.S. 277 (1943) 14

United States v. *Frank*,
354 F.3d 910 (8th Cir. 2004) 25

United States v. *Harriss*,
347 U.S. 612 (1954) 17

United States v. *Kernell*,
667 F.3d 746 (6th Cir. 2012) 24

United States v. *Lanier*,
520 U.S. 259 (1997) 7, 19

United States v. *Moyer*,
674 F.3d 192 (3d Cir. 2012) 24

United States v. *Robertson*,
514 U.S. 669 (1995) 16

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553 U.S. 377 (2008) 16

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384 U.S. 224 (1966) 21

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452 U.S. 576 (1981) 16

United States v. *Waterman*,
— F.3d — , 2014 WL 2724131 (3d Cir. 2014) 29

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18 U.S. (5 Wheat.) 76 (1820) 18, 21

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488 F.3d 752 (7th Cir. 2007) 29

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657 F.3d 688 (8th Cir. 2011) 24

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Guardianship Estate of Keffeler,
537 U.S. 371 (2003) 27

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543 U.S. 209 (2005) 25

STATUTES

16 U.S.C. § 551 14

16 U.S.C. §§ 703 *et seq.* 14

16 U.S.C. § 1857(1)(A) 1

16 U.S.C. § 1858 1

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18 U.S.C. § 43 12

18 U.S.C. § 175 6

18 U.S.C. § 228 11

18 U.S.C. § 711 10
18 U.S.C. § 711a 17
18 U.S.C. § 924(e) 15
18 U.S.C. § 924(e)(2)(B)(ii) 23, 29
18 U.S.C. § 1001 5
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18 U.S.C. § 1512 32
18 U.S.C. § 1519 ..... 1–2, 5, 8, 22–26, 29–34
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18 U.S.C. § 2119 11
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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

John Yates is accused of throwing about six dozen undersized fish into the Atlantic Ocean, thereby making them unavailable for inspection by the National Marine Service. Under the Magnuson–Stevens Fishery Conservation and Management Act, this conduct would ordinarily be met with a maximum fine of $30,000 and a suspended fishing license. 16 U.S.C. §§ 1857(1)(A), 1858(a), (g).

The Government viewed things differently. It charged Yates with violating the anti-shredding provision of Sarbanes-Oxley, 18 U.S.C. § 1519—a federal felony punishable by up to 20 years in prison. Passed in the wake of one of the largest financial scandals in American history, Sarbanes-Oxley forbids the knowing concealment, alteration, or destruction of "any record, document, or tangible object," with the intent to impede a federal investigation. By the Government's lights, the fish are "tangible object[s]," and Yates's "concealment" of those fish to frustrate an investigation under the Magnuson–Stevens Act violated the anti-shredding provision.

The problem is, no one in the public would reasonably expect Sarbanes-Oxley to apply to a fisherman throwing red grouper into the Gulf of Mexico. In context, the phrase "any record, document, or tangible object" no more applies to fish than the phrase "an

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[1] No counsel for a party authored this brief in whole or in part. Neither a party, nor its counsel, nor any entity other than *amici curiae* and their counsel has made a monetary contribution intended to fund the preparation or submission of this brief. The parties' consents to the filing of this brief are on file with the Clerk.

automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle" applies to airplanes. Compare 18 U.S.C. § 1519 with *McBoyle* v. *United States*, 283 U.S. 25, 26–27 (1931). Indeed, if the term "tangible object" encompasses fish, then the statute here captures essentially every physical item within the jurisdictional reach of the United States. That is an unsupportable reading of the statute's text. And the history and purpose of Sarbanes-Oxley only bolster this common-sense conclusion.

The unseemly prosecution in this case, however, is but a symptom of the underlying problem. It is the latest chapter in a long history of the Government's misuse of vaguely drawn statutes to criminalize behavior far beyond what any ordinary person would understand to be prohibited. In the academic world, this problem is known as "overcriminalization." And the term describes two chief evils: *first*, the quantitative expansion of federal law to include countless, and often redundant, criminal provisions; and *second*, the qualitative breadth with which Congress has drafted many of these statutes.

Overcriminalization is not just a theory. Nor are cases like this all that unusual. With some 4,500 criminal statutes scattered throughout the U.S. Code and countless regulatory offenses embedded in federal agencies' rules, large portions of the American public are subject to criminal sanction for conduct ranging from the plainly reprehensible to the plainly inane. To be sure, only some face federal prosecution. But those unlucky few are subject to a maze-like "code" riddled with vague provisions, and are pitted

against an adversary with comparatively limitless resources.

The solution to this problem lies not in a case-by-case review of problematic statutes. Rather, the solution is to revitalize a fundamental maxim of criminal law: "Penal statutes must be construed strictly." 1 W. BLACKSTONE, COMMENTARIES *88 (1765). This ancient rule is reflected in a host of this Court's guideposts for deciding criminal cases—including the rule of lenity and the presumption against expanding a federal criminal statute into the domain of state police power. Yet the principle is more than just a set of disparate rules. As we explain, it is a comprehensive approach to reviewing criminal statutes. It protects against broad, severe application of criminal statutes, unless Congress clearly intended such a result.

Viewed through this lens, it is plain that Congress did not intend to sanction the expansive application of the anti-shredding provision that the Government advocates here. In fact, as shown by the text of the statute and its legislative history, Congress intended an application limited to those who would feed incriminating documents into a shredder or destroy an object (say, a disk) on which *information* was stored.

Amici are eighteen professors of criminal law from across the political and ideological spectrum. Their views on many topics vary widely. *Amici* are united, however, in the view that the growing problem of overcriminalization requires a principled response from the judiciary. In candor, this Court's jurisprudence governing the construction of penal statutes has not been a model of clarity. The lower courts—and the public—would benefit greatly if the Court took this opportunity to revitalize the foundational

precept that novel attempts to expand criminal statutes beyond their clear sweep will be judged against a default presumption of narrow construction.

A more detailed statement describing the *amici* is set forth in the appendix to this brief.

STATEMENT

In August 2007, a field officer of the National Marine Fisheries Service boarded the *Miss Katie*, a commercial fishing vessel operating in the Gulf of Mexico. He asked the ship's captain, Petitioner John Yates, to produce for inspection some 3,000 fish caught by the ship's crew during their multi-day voyage. During the nearly four-hour ordeal, the officer found 72 red grouper that measured less than 20 inches—the minimum length required by federal fishing regulations. He placed the fish into a wooden crate and informed Yates that the Fisheries Service would seize them upon *Miss Katie*'s return to port.

After the officer disembarked, Yates allegedly ordered the crew to dispose of the grouper in the crate and to replace them with larger fish. Upon returning to port, federal agents met with Yates to re-measure the fish. Only 69 of the 72 fish measured less than 20 inches. Suspecting that Yates had disobeyed orders to hold the original fish, the federal agents interviewed the crew. After being threatened with arrest, one crew member accused Yates of ordering the crew to dump the original fish.

Nearly three years later, the Government brought a three-count indictment against Yates, claiming that he: (1) knowingly disposed of undersized fish in order to prevent lawful seizure, in violation of 18 U.S.C. § 2232 ("obstruction"); (2) knowingly destroyed a

"tangible object" with the intent to impede a federal investigation, in violation of 18 U.S.C. § 1519 ("the anti-shredding provision"); and (3) made a false statement to federal authorities, in violation of 18 U.S.C. § 1001. After a four-day trial, Yates was acquitted of making a false statement but convicted of violating the obstruction and anti-shredding provisions. The District Court sentenced him to 30 days in prison, followed by 36 months of supervised release.

Yates appealed, arguing that his conviction under the anti-shredding provision must be reversed because a fish is not a "tangible object" in light of the preceding words in the statute ("records" and "documents") and the purpose of Sarbanes-Oxley. The Government, by contrast, insisted that a "tangible object" refers to *any* physical object—thus bringing fish within the ambit of the anti-shredding provision. The Eleventh Circuit agreed, concluding that "'tangible object,' as § 1519 uses that term, unambiguously applies to fish. See BLACK'S LAW DICTIONARY 1592 (9th ed. 2009) (defining 'tangible' as '[h]aving or possessing physical form')[.]" Without considering the context—or the absurdity that follows from such an expansive definition—the court below disposed of Yates's argument in a single, curt paragraph.

SUMMARY OF ARGUMENT

I. The modern federal criminal code is vast and unwieldy: some 4,500 laws criminalize conduct ranging from stockpiling biological weapons (18 U.S.C. § 175) to falsely representing oneself as a 4-H Club representative (*id.* § 916). Moreover, a host of these laws are redundant. Indeed, some federal crimes—notably fraud and false statements—are independently prohibited by over two hundred different statutes. Combined with over 300,000 federal criminal regulations, the canon benefits only the Government, which has a near-endless menu of charging options in a typical prosecution.

Redundancy, however, is but one troubling consequence of the ever-growing criminal code. Vagueness is another. As evidenced by the number of times this Court has needed to interpret, and re-interpret, certain federal crimes, much of Title 18 and its regulatory counterparts fail to provide the public with fair warning of what conduct is prohibited. This is true on both a macro level—the canon is too vast to comprehend—and a micro level—many individual provisions are poorly drawn.

II. A critical part of the solution to these problems is for the courts to adopt a consistent interpretive approach based on the venerable maxim that "[p]enal statutes must be construed strictly." 1 W. BLACKSTONE, COMMENTARIES *88 (1765). Doing so would serve twin constitutional values: It would promote fair notice of the scope of the law, and it would properly delimit the respective roles of the legislative, executive, and judicial branches—a vital "checks and balances" function in our system of separated powers.

As to the former, judicial precepts including the void-for-vagueness doctrine, the rule of lenity, and the due-process-based prohibition on applying previously undisclosed, novel constructions of criminal statutes all operate to ensure that, "so far as possible the line [between legal and illegal] should be clear." *United States* v. *Lanier*, 520 U.S. 259, 265 (1997). As to the latter, this Court applies numerous narrowing presumptions to criminal statutes in order to keep them cabined within the bounds of clear congressional intent. This vindicates the "principle of legality," which recognizes that the legislature, not the judiciary, possesses the power of punishment.

III. John Yates's conviction cannot withstand scrutiny under a proper construction of Sarbanes-Oxley's anti-shredding provision. In context, *no* valid interpretation of "tangible object" includes fish. Rather, by placing "tangible object" after "records" and "documents" in an Act passed in response to a large-scale accounting scandal, Congress plainly intended to limit the anti-shredding provision to its common-sense application—to the destruction of media containing information.

A. Adopting the Government's position that "tangible object" should be interpreted according to its broad dictionary definition would render "records" and "documents" mere surplusage—in violation of this Court's deep-seated reluctance to read words out of a statute. It would also lead to at least two absurd results. *First*, the anti-shredding provision would become coextensive with the general obstruction statute. *Second*, the anti-shredding provision would become unnecessary. If Congress wanted to increase the penalty for obstruction, it knew how to do so. It

did not. It simply "closed a loophole" in the prohibition against spoliating corporate financial records.

B. Moreover, the interpretive canon of *ejusdem generis* precludes the Government's expansive reading of "tangible object." This catch-all phrase must be limited to objects similar in nature to the listed examples—*i.e.*, "records" and "documents."

Precedent supports this conclusion. In 1931, for example, the Court, per Justice Holmes, rejected the Government's attempt to qualify an airplane as a "motor vehicle" where the statute's listed examples all moved on land. And in 2008, the Court rejected the Government's attempt to qualify drunk driving as a "violent felony" where the statute's listed examples were all "purposeful, violent, and aggressive" rather than negligent or reckless. The same logic compels a narrow construction here: Where the statute's listed examples represent means of storing information, "tangible object" cannot include fish.

C. Further still, the history and purpose of Sarbanes-Oxley do not support the Government's position. The Act was aimed at accountants, auditors, and lawyers—not fishermen. Congress passed the Act to prevent and punish corporate fraud, and to protect the victims of such fraud.

The anti-shredding provision is no exception. Rather, as the legislative history demonstrates, § 1519 was aimed specifically at filling gaps in then-existing law regarding the destruction of evidence and the retention of financial records. It was not intended to criminalize destroying undersized red grouper.

D. In the end, there is no ambiguity as to whether the anti-shredding provision should be applied to

Yates. But if any ambiguity remained after the preceding considerations were weighed, the rule of lenity would compel resolving that ambiguity in Yates's favor. As both a tiebreaker and a rule of constitutional avoidance, the rule of lenity protects would-be criminal defendants from being subject to undue punishment under vague prohibitions—and thus furthers the constitutional value of fair notice.

The decision below should be reversed.

ARGUMENT

I. The federal criminal code has grown vastly to include many redundant and vague criminal provisions that permit prosecution of a wide range of conduct.

Today's federal criminal code would be profoundly troubling to the Founders. As James Madison wrote in FEDERALIST NO. 62, "[i]t will be of little avail to the people * * * if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood[.]" Yet these words provide an apt description of today's U.S. criminal code. As one commentator puts it, the federal criminal "code" is a "haphazard grabbag of statutes accumulated over 200 years"—it is "incomprehensible, random and incoherent, duplicative, ambiguous, incomplete, and organizationally nonsensical." Julie O'Sullivan, *The Federal Criminal "Code" is a National Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 643 (2006) (internal quotation marks and footnotes omitted).

Neither prosecutors nor their targets can plumb the depths of this criminal law. Federal law addresses conduct ranging from unquestionably serious

crimes (*e.g.*, 18 U.S.C. § 2381 (treason)), to trivial ones (*e.g.*, *id.* § 711 (unauthorized reproduction of "Smokey Bear")). As one well-known jurist has observed, "most Americans are criminals and don't even know it." Alex Kozinski & Misha Tseytlin, *You're (Probably) a Federal Criminal*, *in* IN THE NAME OF JUSTICE 43, 44–45 (Timothy Lynch ed., 2009).

To be sure, U.S. Attorneys cannot (and would not) enforce every one of these provisions every time it was violated. For those who do get prosecuted, however, the circumstances are grim. The vastness of the federal code and the breadth of myriad statutes provide the imaginative prosecutor with near-endless permutations of crimes to charge. Exercising prosecutorial discretion has evolved "from an exercise of wisdom to a selection of weaponry." Robert Weisberg, *Crime and Law: An American Tragedy*, 125 HARV. L. REV. 1425, 1445 (2012).

In light of the powerful advantages that prosecutors enjoy in the federal arena, this grand arsenal of chargeable offenses essentially guarantees conviction. In 2013, for example, the Government's overall success rate was 91.6%, and that rate jumps to 99.6% when one excludes cases that were dismissed outright. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS tbl. D-4 (Mar. 31, 2013).

These problems pervade the federal criminal code and have been subject to condemnation by groups across the political spectrum—from the American Civil Liberties Union to the Heritage Foundation. See Zach Dillon, *Forward: Symposium on Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 525, 525 (2013). As we demonstrate below, the Court should

begin to address these issues by reading the criminal provision at issue here strictly.

A. The sheer quantity of federal crimes has created an overbroad and largely redundant "code."

According to recent estimates, U.S. law contains 4,450 criminal provisions. BRIAN WALSH & TIFFANY JOSLYN, WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW 6 (2010). Roughly half of them are "found jumbled together in Title 18, euphemistically referred to as the 'Federal Criminal Code.'" Ronald Gainer, *Federal Criminal Code Reform: Past & Future*, 2 BUFF. CRIM. L. REV. 45, 53 (1998). The balance are scattered about the other 49 titles of the U.S. Code. *Ibid.* Many of these provisions came into force over the past half century, with "[m]ore than 40% of the federal criminal provisions enacted since the Civil War hav[ing] been enacted since 1970." A.B.A. CRIM. JUST. SEC., TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW 7 (1998).

All too often, "[n]ew crimes are * * * enacted in patchwork response to newsworthy events, rather than as part of a cohesive code developed in response to an identifiable federal need." *Id.* at 14–15. Indeed, political pressure to take a stand in response to a national scandal frequently prods Congress to pass a flurry of open-ended criminal statutes. William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529–33 (2001). Notable examples of so-called "*crime du jour*" lawmaking in Title 18 include carjacking (§ 2119), failure to pay child support (§ 228), and interference with the operations

of an "animal enterprise" (§ 43). See Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 755–56 (2005).

Seldom does Congress consider whether it must re-write or repeal an existing law to accommodate a new one. The reality is that the "political process of criminal law legislation is * * * a 'one-way ratchet' * * *. Criminal codes expand but don't contract." Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 223 (2007). Consequently, "new statutes [are often] layered over the existing federal criminal statutes," to the end of widespread redundancy. Sara Sun Beale, *Too Many, Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979, 980 (1995).

Consider, for example, four basic federal crimes: fraud, forgery, false statements, and destruction of property. By one count, there are "232 statutes pertaining to theft and fraud, 99 pertaining to forgery and counterfeiting, 215 pertaining to false statements, and 96 pertaining to property destruction." O'Sullivan, *supra*, at 654. These statutes "contain their own idiosyncratic verbiage and definitions, and bear some semblance of uniformity only with regard to the substantial nature of the penalties specified for their breach." Ronald Gainer, *Remarks on the Introduction of Criminal Law Reform Initiatives*, 7 J.L. ECON. & POL'Y 587, 588 (2011). To the extent that this "tower of legal babble" (*ibid.*) helps anyone, it helps the Government: "Some of the statutes will offer prosecutors important advantages over others—in terms of such matters as venue, proof, evidentiary

admissibility, or sentencing impact. * * * The effect * * * is to give prosecutors substantially greater bargaining power vis-a-vis the defense." O'Sullivan, *supra*, at 654.

Now add to this expansive body of criminal statutes a mountain of federal criminal regulations. According to one estimate, there are now more than 300,000 federal regulations that may trigger criminal sanctions. *Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 7 (2009) (testimony of Richard Thornburgh, former Attorney General of the United States). Indeed, even the Justice Department does not know how many federal crimes there are. See Paul Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 726 (2013).

Still worse, many of these regulatory offenses proscribe conduct that is *malum prohibitum*—*i.e.*, conduct that is wrong only because it is prohibited. Everyone knows that it is immoral to kill, rape, or steal. The same cannot be said, however, of importing nonveneered ebony wood from India, snowmobiling into a national forest in the midst of a blizzard, or saving a bird from the clutches of a hungry cat. Yet as Gibson Guitar Corp.,[2] IndyCar champion Bobby Unsar,[3] and

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[2] See C. Jarrett Dieterle, Note, *The Lacey Act: A Case Study in the Mechanics of Overcriminalization*, 102 GEO. L.J. 1279, 1284–86 (2014) (summarizing the prosecution of Gibson Guitar Corp. under the Lacey Act, 16 U.S.C. §§ 3371 *et seq.*).

11-year-old Skylar Capo[4] found out, the Government has no qualms about prosecuting such behavior. As these heavy-handed prosecutions show, the vast ocean of regulatory crimes—including many offenses that are "wrongful only because [they are] illegal"—threatens to "allow punishment where 'consciousness of wrongdoing be totally wanting.'" Stephen Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 538 (2012) (quoting *United States* v. *Dotterweich*, 320 U.S. 277, 284 (1943)).

In short, the ever-expanding breadth and redundancy of the federal statutory and regulatory criminal "code" threatens to create, in the words of the late Bill Stuntz, "a world in which the law on the books makes everyone a felon." Stuntz, *supra*, at 511.

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[3] *Reining in Overcriminalization: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 21–35 (2010) (statement of Robert "Bobby" Unser, detailing his prosecution under 16 U.S.C. § 551 and 36 C.F.R. § 261.16 for unintentionally entering a national forest with a snowmobile during a blizzard).

[4] *Girl saves woodpecker, but her mom fined $535*, CBS NEWS, Aug. 4, 2011, *available at* http://www.cbsnews.com/news/girl-saves-woodpecker-but-her-mom-fined-535/ (reporting the citation of an 11-year-old child under the Migratory Bird Act, 16 U.S.C. §§ 703 *et seq.*, for saving an endangered woodpecker from being eaten by the family cat). The charges were dropped after an international outcry over the incident.

B. Many federal criminal laws, and the code as a whole, are unclear.

Unfortunately, locating a germane statute is no guarantee that one can actually understand what is allowed and what is not. Rather, Congress often drafts open-ended statutes that fail to define key elements of the subject crime. "Fuzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation is attractive to the Congressman who wants credit for addressing a national problem but does not have the time (or perhaps the votes) to grapple with the nitty-gritty." *Sykes* v. *United States*, 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting). And many federal agencies have followed suit.

As numerous scholars have pointed out, Congress faces a distorted incentive structure in the criminal arena: Many people, supported by well-established interest groups, crave open-ended crimes that permit—or encourage—novel and expansive application; yet very few advocate intelligible limits on the law to prevent its abuse. *E.g.*, Stuntz, *supra*, at 545–57; Brown, *supra*, at 232–33. "Rarely does an interest group of significant influence emerge to counter the influence" of prosecutors and other special-interest groups, which are particularly effective in seeking new and expansive criminal provisions. Brown, *supra*, at 233.

Regrettably, Title 18 is littered with these kinds of statutes, many of which make routine appearances on this Court's docket. For example, the Armed Career Criminal Act (§ 924(e)) has appeared 12 times

since 1990,[5] and the Racketeer Influenced and Corrupt Organizations Act (§ 1962) has appeared 9 times since 1981.[6]

In far too many cases, the broad sweep of federal law means that no one is truly on notice as to what conduct constitutes a federal crime. See Edwin Meese III & Paul Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 738–41 (2012). "Traditionally, the concern has been whether *a particular statute* is sufficiently clear so that the average person can readily understand it and remain law-abiding. Nowadays, the difficulty is that *the entire criminal code* has become unknowable and subject to manipulation"—*i.e.*, the problem exists at both "the retail level," with "specific crime[s]" un-

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[5] *Descamps* v. *United States*, 133 S. Ct. 2276 (2013); *Sykes* v. *United States*, 131 S. Ct. 2267 (2011); *McNeil* v. *United States*, 131 S. Ct. 2218 (2011); *Johnson* v. *United States*, 559 U.S. 133 (2010); *Chambers* v. *United States*, 555 U.S. 122 (2009); *United States* v. *Rodriquez*, 553 U.S. 377 (2008); *Begay* v. *United States*, 553 U.S. 137 (2008); *Logan* v. *United States*, 552 U.S. 23 (2007); *James* v. *United States*, 550 U.S. 192 (2007); *Shepard* v. *United States*, 544 U.S. 13 (2005); *Caron* v. *United States*, 524 U.S. 308 (1998); *Taylor* v. *United States*, 495 U.S. 575 (1990).

[6] *Boyle* v. *United States*, 556 U.S. 938 (2009); *Bridge* v. *Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008); *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158 (2001); *Salinas* v. *United States*, 522 U.S. 52 (1997); *United States* v. *Robertson*, 514 U.S. 669 (1995); *Nat'l Org. for Women, Inc.* v. *Scheidler*, 510 U.S. 249 (1994); *Reves* v. *Ernst & Young*, 507 U.S. 170 (1993); *H.J. Inc.* v. *Nw. Bell Tel. Co.*, 492 U.S. 229 (1989); *United States* v. *Turkette*, 452 U.S. 576 (1981).

der "vague law[s]," and "the wholesale level, with the entire body of federal criminal law, in all of its complexity." *Id.* at 763 (footnote omitted).

Indeed, the incoherence of the federal code "makes it difficult for even specialists in criminal law to find the law, much less ordinary citizens to determine their legal obligations." Smith, *Overcoming Overcriminalization*, *supra*, at 566. Compounding the problem, federal law now criminalizes a slew of trivial conduct "wholly unrelated to moral delinquency,"[7] such that people may no longer rely upon their internal compass to differentiate "right" from "wrong." Meese and Larkin, *supra*, at 740.

As a result, the unchecked growth of the federal canon "frustrates both the rule-of-law imperative that the criminal law should be accessible to the public so they can conform their behavior to it and potentially the notion that it is unfair to punish absent fair warning." Smith, *Overcoming Overcriminalization*, *supra*, at 566. As this Court has long held, "'no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'" *Bouie* v. *City of Columbia*, 378 U.S. 347, 351 (1964) (quoting *United States* v. *Harriss*, 347 U.S. 612, 617 (1954)). Yet the Government does just that when it calls citizens to answer for *mala prohibita* proscriptions buried deep in the U.S. Code or Code of Federal Regulations.

Poorly drawn statutes exacerbate these problems. A nebulous statute with harsh penalties incentivizes prosecutors to charge the offending conduct under a

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[7] "Give a Hoot, Don't Pollute!" See 18 U.S.C. § 711a (potentially criminalizing this footnote).

more general provision, either instead of or in addition to a provision more specifically tailored to the conduct that carries a lesser penalty. This results in disproportionate punishment that Congress arguably did not intend. Stephen Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 934–37 (2005). Moreover, when breadth crosses over to ambiguity—or worse, vagueness—due-process concerns arise. We discuss those issues more fully below.

II. This Court should address these problems of redundancy and vagueness by construing criminal statutes strictly—as required by fundamental, constitutionally driven interpretive principles.

Given the vast expanse of modern federal criminal law, a consistent approach to interpreting that body of law is more critical today than ever. An approach anchored in the principle that "[p]enal statutes must be construed strictly" (1 W. BLACKSTONE, COMMENTARIES *88 (1765)) would serve two fundamental values rooted in the text, structure, history, and purpose of the Constitution: The need to provide fair notice of the scope of the law, particularly where one's liberty is at stake; and the principle of separation of powers, which gives Congress primacy in defining federal crimes but provides a "checks and balances" role for the judiciary in interpreting those crimes. We discuss both in turn.

The fair-notice requirement springs from "the tenderness of the law for the rights of individuals." *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). In keeping with "ordinary notions of fair play and the settled rules of law," "the terms of a penal statute creating a new offense must be sufficiently

explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *Connally* v. *Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). "No one," this Court has held, "may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939). Thus, due process compels that criminal statutes provide "'fair warning * * * in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.'" *Lanier*, 520 U.S. at 265 (quoting *McBoyle*, 283 U.S. at 27).

Fair notice manifests itself in three related judicial precepts. *First*, the void-for-vagueness doctrine prohibits enforcement of "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally*, 269 U.S. at 391. *Second*, the rule of lenity holds that if, after exhausting all legitimate tools of interpretation a "reasonable doubt persists" (*Moskal* v. *United States*, 498 U.S. 103, 108 (1990)), "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity" (*Skilling* v. *United States*, 561 U.S. 358, 410 (2010)). The rule of lenity thus serves to avoid the wholesale abrogation of statues under the vagueness doctrine. *Third*, "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *Lanier*, 520 U.S. at 266.

In addition to fair notice, this Court has long recognized "the plain principle that the power of pun-

ishment is vested in the legislative, not in the judicial department." *Wiltberger*, 18 U.S. at 95. Sometimes referred to as the "principle of legality" (John C. Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 190 (1985)), this rule—rooted in the separation of powers—holds that "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community," courts have "'the instinctive distaste[] against men languishing in prison unless [Congress] has clearly said they should.'" *United States* v. *Bass*, 404 U.S. 336, 348 (1971) (quoting Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, reprinted in HENRY J. FRIENDLY, BENCHMARKS, 196, 209 (1967)).

Accordingly, this Court often applies a variety of narrowing presumptions to criminal statutes, designed to prevent prosecutors from expanding the scope of a criminal prohibition beyond clear congressional intent and the scope of their executive authority. For example, the Court presumes that "Congress intends to incorporate the well-settled meaning of the common-law terms it uses" (*Neder* v. *United States*, 527 U.S. 1, 23 (1999)), and it resists novel prosecutorial theories that attempt to exploit ambiguous language to expand crimes beyond their accepted boundaries at common law. *Sekhar* v. *United States*, 133 S. Ct. 2720, 2724–26 (2013) (refusing to extend the Hobbs Act's prohibition on extortion, which requires "the obtaining of property from another," to an attempt to extort approval of a financial investment).

In a similar vein, this Court recently reaffirmed that federal courts are to avoid reading statutes in a manner that "'dramatically intrude[s] upon tradition-

al state criminal jurisdiction.'" *Bond* v. *United States*, 134 S. Ct. 2077, 2088, 2093 (2014) (quoting *Bass*, 404 U.S. at 350). Where federal laws threaten such an intrusion, this Court looks for a "clear statement assur[ing] that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Bass*, 404 U.S. at 350. Absent a "clear indication that Congress meant to reach purely local crimes," this Court provides a check on the unwarranted expansion of executive power—it reads the statute at issue narrowly. See *Bond*, 134 S. Ct. at 2090.

Both the fair-notice requirement and the principle of legality point back to the foundational concept "penal laws are to be construed strictly" (*Wiltberger*, 18 U.S. at 95), with "all reasonable doubts concerning [the statute's] meaning * * * operat[ing] in favor of the [defendant]." *Harrison* v. *Vose*, 50 U.S. (9 How.) 372, 378 (1850). The concept is not, of course, "a substitute for common sense, precedent, and legislative history." *United States* v. *Standard Oil Co.*, 384 U.S. 224, 225 (1966). If Congress has plainly forbidden a particular act—or consciously refused to write a criminal statute in a more lenient manner—no amount of charity toward the defendant can save her from conviction. See *Loughrin* v. *United States*, — S. Ct. — (2014) (slip op. at 5–6) (refusing to read a specific-intent *mens rea* requirement into the federal bank fraud statute (18 U.S.C. § 1344), where doing so would render part of the statute superfluous). But in cases where Congress has not spoken clearly, courts should engage the interpretive process with an eye towards the narrowest reasonable construction.

III. The Government's boundless interpretation of the anti-shredding provision flouts the strict construction required here.

With these principles in mind, we address the incongruity of the Government's interpretation of Sarbanes-Oxley's anti-shredding provision as applied to its prosecution of John Yates.

A. No interpretation of "tangible object" in the context of § 1519, much less the required strict interpretation, can reasonably include fish.

According to the Government, Yates violated the anti-shredding provision by destroying a "tangible object"—fish—with the intent to impede a federal investigation. The Government says this term must be given its dictionary definition: anything "having or possessing physical form." J.A. 132.

This capacious interpretation, however, is wholly divorced from the statutory context. "[A] reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). When read in context, the Government's dictionary definition of "tangible object" runs headlong into a serious interpretative problem—the rule against superfluity.

This Court has repeatedly expressed "a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment" (*Pa. Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 562 (1990)), and this "resistance" is "height-

ened when the words describe an element of a criminal offense" (*Ratzlaf* v. *United States*, 510 U.S. 135, 140–41 (1994)). Such is the case here. Consider the broader phrase in which the term "tangible object" is found: "any record, document, or tangible object." 18 U.S.C. § 1519. If indeed Congress intended "tangible object" to cover any object having physical form, the more specific words that precede it—"record" and "document"—would become mere surplusage.

The Government's error in this case echoes its error in *Begay* v. *United States*, 553 U.S. 137 (2008), where it argued that a drunk-driving conviction qualified as a "violent felony" under the Armed Career Criminal Act's catch-all provision—a crime punishable by more than one year in prison that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). This Court would have none of that view. As it explained, "the provision's listed examples [that precede the catch-all provision]—burglary, arson, extortion, or crimes involving the use of explosives—illustrate the kinds of crimes that fall within the statute's scope," *i.e.*, crimes involving an element of violence. 553 U.S. at 142. "Their presence," the Court continued, "indicates that the statute covers only *similar* crimes, rather than *every* crime that 'presents a serious potential risk of physical injury to another.'" *Ibid.* (citing 18 U.S.C. § 924(e)(2)(B)(ii)). Rejecting the Government's "all encompassing" reading of this phrase, the Court stressed that, "[i]f Congress meant [such an expansive definition], it is hard to see why it would have needed to include the examples at all. Without them, clause (ii) would cover *all* crimes that present a 'serious potential risk of physical injury.'" *Ibid.*

The same logic governs here. If Congress intended § 1519 to prohibit destroying or concealing any object "having or possessing physical form" (J.A. 132), it could have simply barred the knowing destruction or concealment of any "tangible object"—without further qualification. But it did not. It provided examples of classes of articles it wished to target—*i.e.*, "record[s]" and "document[s]," followed by a catch-all phrase—"tangible object." That more general phrase can and must be read in harmony with the specific, illustrative examples that precede it. *Begay*, 553 U.S. at 142; *cf.* Part III.B, *infra* (discussing the principle of *ejusdem generis*). Defining "tangible object" as any object "having or possessing physical form" would obliterate any semblance of the limitation that "record" and "document" place on § 1519. Reading the statute strictly, as this Court must, such a definition is unacceptable.

Furthermore, the Government's reading of "tangible object" leads to two absurd results. *First*, reading § 1519 to encompass all objects "having or possessing physical form" would make the provision co-extensive with the general obstruction provision, which criminalizes the destruction of any "property" subject to seizure by the Government. 18 U.S.C. § 2232. This cannot be right. If it were, the anti-shredding provision could be used to prosecute suspects who flush drugs down the toilet to avoid arrest (*United States* v. *Birbal*, 113 F.3d 342 (2d Cir. 1997)),[8] transport prop-

[8] This scenario is particularly troubling given the weak reading that lower courts have given § 1519's specific-intent requirement. *E.g.*, *United States* v. *Moyer*, 674 F.3d 192, 208–10 (3d Cir. 2012); *United States* v. *Kernell*, 667 F.3d 746, 752–54 (6th Cir. 2012); *United States* v. *Yield-*

erty out of a State to avoid criminal restitution payments (*United States* v. *Frank*, 354 F.3d 910 (8th Cir. 2004)), or set fire to a methamphetamine lab to avoid detection (*United States* v. *Coleman*, 148 F.3d 897 (8th Cir. 1998)). Neither common sense nor the history and purpose of Sarbanes-Oxley (see Part III.C, *infra*) suggest that Congress intended to give the anti-shredding provision such far-reaching scope.

Second, accepting that Congress intended such a profound shift in the law makes a paradox out of § 1519. If Congress wanted to increase the punishment for the precise conduct already forbidden under § 2232 (the obstruction statute), it did not need to enact § 1519—it could have simply increased the maximum penalty for violating § 2232.

The Congress that drafted Sarbanes-Oxley knew how to do this, and in fact did so in both the mail and wire fraud statutes. Pub. L. No. 107-204, 116 Stat. 745, 805 (2002) (increasing the penalties for mail and wire fraud from 5 to 20 years); see *Whitfield* v. *United States*, 543 U.S. 209, 216–17 (2005) (rejecting an overt-act requirement for conspiracy to commit money laundering because Congress "knows how to impose such a requirement when it wishes to do so").

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ing, 657 F.3d 688, 711–14 (8th Cir. 2011). A defendant need not intend to impede a *federal* investigation; rather, he need only intend to impede *some* investigation (pending or merely contemplated) that eventually becomes a federal one. By this logic, a suspect who disposes of a small bag of marijuana to avoid arrest by local police could be referred to the U.S. Attorney's Office and face a 20-year felony conviction. See 21 U.S.C. § 844 (criminalizing misdemeanor possession of a controlled substance).

Yet Congress chose a different course here. Rather than increasing the penalty for violating the general obstruction provision, it passed the anti-shredding statute to "close loopholes" in the laws forbidding the spoliation of corporate financial records. S. Rep. No. 107-146, at 14 (2002). In effect, then, the Government would have this Court draw an inference from Congress's silence—something this Court has expressly refused to do "when it is contrary to all other textual and contextual evidence of congressional intent." *Burns* v. *United States*, 501 U.S. 129, 136 (1991).

At bottom, an interpretation of § 1519 that would sustain Yates's conviction cannot be squared with either the principle of strict construction or common sense. Yates's conduct, to be sure, is not innocent. But it is "impossible to believe" that Congress meant to express the same degree of moral outrage towards those who skirt fishing regulations—a mere civil infraction—as it did towards those who perpetrated one of the largest financial scandals in American history. *Cf. Abuelhawa* v. *United States*, 556 U.S. 816, 822–23 (2009) (finding it "impossible to believe" that Congress intended the felony drug-facilitation provision to cause "a twelve-fold quantum leap in punishment for simple drug possessors" who set up multiple buys that aggregate to a felony quantity).

B. Under the canon of *ejusdem generis*, the term "tangible object" must refer to something similar to a "record" or a "document"—which does not include fish.

Rejecting the Government's reading of "tangible object" in § 1519 is also compelled by the familiar canon of *ejusdem generis*. "'[W]here general words

follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'" *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 114–15 (2001) (quoting 2A N. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 47.17 (1991)).

Ejusdem generis is "often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Wash. State Dep't of Social & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 384–85 (2003) (quoting *Jarecki* v. *G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)). This is doubly true of penal statutes, where the law favors narrow construction: "The fact that a particular activity may be within the same general classification and policy of those covered does not necessarily bring it within the ambit of the criminal prohibition." *United States* v. *Boston & Maine R.R.*, 380 U.S. 157, 160 (1965). Rather than construing a statute to sweep up "*every* crime" that might conceivably fall within the literal meaning of a single, catch-all provision (*Begay*, 553 U.S. at 142), courts must interpret criminal provisions only as broadly as their text, read as a whole, warrants. See *Hughey* v. *United States*, 495 U.S. 411, 415–19 (1990) (limiting criminal restitution to amount of loss caused by the specific conduct that is the basis of conviction, despite judicial authority to consider "other [appropriate] factors" in setting the amount).

This Court's seminal opinion in *McBoyle* is particularly relevant. The defendant there was convicted of transporting a stolen airplane—which the Government deemed a "motor vehicle"—across state lines.

283 U.S. at 25. The statute defined "motor vehicle" as "an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails[.]" *Id.* at 26. Despite the statute's specific references to terrestrial forms of transportation, the Government claimed that use of the word "vehicle" in a catch-all provision expanded the statute to include airplanes.

In a decision authored by Justice Holmes, the Court disagreed. Although it acknowledged that, "etymologically it is possible to use the word to signify a conveyance working on land, water or air," use of the word "vehicle" in "everyday speech" calls up "the picture of a thing moving on land." *Ibid.* And the context of the term "motor vehicle" reinforced this "popular picture": "For after including automobile truck, automobile wagon and motor cycle, the words 'any other self-propelled vehicle not designed for running on rails' still indicate that a vehicle in the popular sense, that is a vehicle running on land is the theme. It is a vehicle that runs, not something, not commonly called a vehicle, that flies." *Ibid.* Thus, the Court concluded, "[i]t is impossible to read words that so carefully enumerate the different forms of motor vehicles and have no reference of any kind to aircraft, as including airplanes under a term that usage more and more precisely confines to a different class." *Id.* at 27.

This Court's more recent decision in *Begay* is of a piece with *McBoyle*. The Court in *Begay* rejected the argument that drunk driving was a "violent felony" simply because it may, as a linguistic matter, be said to "present[] a serious potential risk of physical injury to another." 553 U.S. at 141 (quoting 18 U.S.C.

§ 924(e)(2)(B)(ii)). Rather, the Court distinguished drunk driving from the listed crimes—burglary, arson, extortion, and crimes involving the use of explosives—by observing that they "all typically involve purposeful, 'violent,' and 'aggressive' conduct." *Id.* at 144–45. Drunk driving, by contrast, "is a crime of negligence or recklessness, rather than violence or aggression." *Id.* at 146 (quotation omitted).

The same reasoning applies with even greater force here. The common trait linking a "record" and a "document" is that both physically store information. See BLACK'S LAW DICTIONARY 587 (10th ed. 2014) (defining "document" as "[s]omething tangible on which words, symbols, or marks are recorded"); *id.* at 1465 (defining "record" as a "documentary account of past events"). Much as the words "automobile truck, automobile wagon and motor cycle" conjured up images of land-based "vehicles" in *McBoyle*, the words "record" and "document" evoke "tangible objects" used to store data—*e.g.*, a cabinet containing files or an accountant's ledger. "Tangible object," then, refers only to physical objects that, like records and documents, are used *to store information*. It includes, for example, compact discs (*United States* v. *Wortman*, 488 F.3d 752 (7th Cir. 2007)), hard drives (*United States* v. *Waterman*, — F.3d —, 2014 WL 2724131 (3d Cir. 2014)), and any other physical object that preserves information for later use.

But not fish. The terms "record" and "document" do not encompass "red grouper." The Government tacitly admits this by attempting to sever "tangible object" from the items that precede it. Yet this is precisely what *ejusdem generis* prohibits.

As in *Begay*, expanding the objects subject to § 1519 effectively transforms the crime itself. The provision forbids the knowing alteration, destruction, falsification or concealment of documents, records, and the like. Particularly in light of the history of Sarbanes-Oxley, this language points the reader to a very specific *actus reas*: shredding documents. One may also envision related bad acts having the same effect, such as falsifying government reports, hiding financial information from auditors, or smashing hard drives containing damning e-mails. But one does not—under any plausible reading of the text—picture a fisherman throwing undersized fish into the sea.[9]

No one would dispute that catch-all provisions operate to expand a statute's literal scope. But where Congress precedes such catch-all provisions with specific, enumerated examples, those examples necessarily limit such expansion. *Circuit City Stores, Inc.*, 532 U.S. at 114–15. Faithful adherence to this well-recognized canon is all the more important when ignoring it would expand a criminal statute. The Government's definition of "tangible object" strips the words "record" and "document" of their proper limiting effect on the ambit of § 1519 and opens the provision up to encompass a wide range of conduct that no ordinary reader would understand to fall within it. That definition must be rejected.

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[9] In theory, if a fish were large enough, it might amount to a "record." But even entertaining that imaginative, out-of-context reading of the statute's language, the problem with the fish tale here is that Yates is charged with destroying fish that were *too small*.

C. The history and purpose of Sarbanes-Oxley further undermine the Government's definition of "tangible object."

The legislative history and purpose of Sarbanes-Oxley point in the same direction. This Court is familiar with the Act's background: Congress passed the statute in response to "a series of celebrated accounting debacles" (*Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3147 (2010)), and in particular "the collapse of Enron Corporation" (*Lawson* v. *FMR LLC*, 134 S. Ct. 1158, 1161 (2014)). "In the Enron scandal that prompted the Sarbanes-Oxley Act, contractors and subcontractors" and Enron's own "accounting firm * * * participated in Enron's fraud and its coverup." *Id.* at 1162. As investors and regulators attempted to ascertain both the extent and cause of Enron's losses, the accounting firm's partners allegedly "launched * * * a wholesale destruction of documents," shredding "tons" of documents. S. Rep. No. 107-146, at 4.

In response, Congress enacted "numerous provisions aimed at controlling the conduct of accountants, auditors, and lawyers who work with public companies," with the express "aim[] to 'prevent and punish corporate and criminal fraud, protect the victims of such fraud, preserve evidence of such fraud, and hold wrongdoers accountable.'" *Lawson*, 134 S. Ct. at 1162 (quoting S. Rep. No. 107-146, at 2). These enactments included several revisions to Title 18 designed to "provide prosecutors with the tools they need to prosecute those who commit securities fraud, and make sure that victims of securities fraud" can "recoup their losses." S. Rep. No. 107-146, at 2.

Section 1519, dubbed the "anti[-]shredding provision," was designed "to clarify and close loopholes in the existing criminal laws relating to the destruction or fabrication of evidence and the preservation of financial and audit records." *Id.* at 14. The provision addresses "shortcomings in current law that the Enron matter has publicly exposed." *Id.* at 6. Congress lamented that "current laws regarding destruction of evidence are full of ambiguities and limitations that must be corrected." *Id.* at 7. "Indeed," Congress noted, "even in the [then-]current [Enron] case, prosecutors [were] forced to use the 'witness tampering' statute, 18 U.S.C. 1512, and to proceed under the legal fiction that the defendants are being prosecuted for telling other people to shred documents, not simply for destroying evidence themselves."[10] *Ibid.*

The legislative history leaves no room for equivocation about Congress's intent: "[I]t only takes a few seconds to warm up the shredder, but it will take years for victims to put this complex case back together again. It is time that the law is changed to provide victims the time they need to prove their cases to recoup their losses." *Id.* at 9–10. Section 1519 does just that, criminalizing the destruction of corporate records with the intent of frustrating a federal investigation.

This intent is entirely harmonious with the narrow, common-sense reading of the statutory text, discussed above. Accordingly, Yates's conviction under § 1519 cannot stand.

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[10] This Court eventually reversed the conviction resulting from this "legal fiction." *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 708 (2005).

D. The rule of lenity likewise compels a narrow construction of the anti-shredding provision.

As we have shown, the "text, structure, history and purpose" of Sarbanes-Oxley leave no doubt that, when Congress enacted the anti-shredding provision, it did not have fish in mind. See *Barber* v. *Thomas*, 560 U.S. 474, 488 (2010). If, however, some "reasonable doubt persists about the statute's intended scope" (*Moskal*, 498 U.S. at 108), the rule of lenity compels a narrowing construction in Yates's favor.

The rule of lenity functions as a tiebreaker, construing an ambiguous statute in favor of the accused and in favor of individual liberty. If traditional interpretative tools leave the Court to "simply guess" where Congress intended to draw the line between innocence and guilt (*Barber*, 560 U.S. at 488 (internal quotation marks omitted)), the "'ambiguity concerning the ambit of [the] criminal statute[] should be resolved in favor of lenity'" (*Skilling*, 561 U.S. at 410 (quoting *Cleveland* v. *United States*, 531 U.S. 12, 25 (2000))).

The rule of lenity also acts as a rule of avoidance of constitutional difficulties. If a statute is so unclear that courts must guess as to its proscriptive reach, *a fortiori* it fails to give "fair warning * * * in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle*, 283 U.S. at 27. Thus, resolving the doubt in favor of the accused obviates the need to decide whether the statute is unconstitutionally vague.

Although the interpretive canons discussed above definitively resolve this case, at the very least they

reflect ambiguity in Yates's favor. Read in a vacuum, the term "tangible object" might suggest that Congress intended to sweep up every object "having or possessing physical form," including undersized fish. But the words "any record, document, or tangible object"—that is, the actual words of the statute—do not. See *McBoyle*, 283 U.S. at 26–27.

Moreover, the Government's reading of the anti-shredding provision creates a structural oddity within the broader context of Title 18's obstruction provisions, by giving words of a more limited nature the exact same punitive scope as words of far more general meaning. Compare 18 U.S.C. § 1519 (prohibiting the destruction of any record, document, or tangible object"), with *id.* § 2232(a) (prohibiting the destruction of "property"). And insofar as the Congress that passed Sarbanes-Oxley knew how to modify extant criminal laws (see 116 Stat. 805 (amending the mail and wire fraud statutes)), it would be truly puzzling to say that the same Congress consciously designed the anti-shredding provision to be a *de facto* replacement for the general obstruction statute. In fact, as shown above, the legislative history does not manifest such an odd intent. It shows that Congress simply aimed to "close loopholes" in the existing law that the Enron scandal "publicly exposed." S. Rep. No. 107-146, at 6, 14.

Fish and corporate documents are vastly different in character. What is more, there was no loophole to "close" for the conduct of which Yates is accused: He was successfully prosecuted under § 2232's general obstruction provision. It is thus inconceivable that ordinary people would understand, based on the passage of Sarbanes-Oxley, that they face up to 20 years

behind bars for failing to retain evidence of a small-time regulatory infraction.

In the end, this Court need not reach the rule of lenity, as doing so would require it first to find the anti-shredding provision to be "grievous[ly] ambigu[ous] or uncertain[]." *Staples* v. *United States*, 511 U.S. 600, 619, n.17 (1994) (internal quotation marks omitted). But if the rule needs to be invoked, it too warrants reversing Yates's conviction.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

APPENDIX

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

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IN THE
Supreme Court of the United States

JOHN L. YATES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER JOHN YATES

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TABLE OF CONTENTS

INTEREST OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. PETITIONER'S CONVICTION UNDER SARBANES-OXLEY EXEMPLIFIES OVERCRIMINALIZATION THROUGH AN UNCONSTITUTIONAL EXPANSION OF THE LAW 4

A. THE OVERCRIMINALIZATION EPIDEMIC 6

B. CONGRESSIONAL TASK FORCE ON OVERCRIMINALIZATION 7

C. EXECUTIVE EXPANSION OF 18 U.S.C. § 1519 TO INCLUDE RED GROUPER FURTHERS THE OVERCRIMINALIZATION EPIDEMIC 9

1. Red Grouper are Not "Tangible Objects" under Sarbanes-Oxley 10

2. Bond v. United States 11

D. EVEN IF SARBANES-OXLEY APPLIES TO FISH, YATES' CONDUCT DID NOT IMPEDE, OBSTRUCT, OR INFLUENCE A FEDERAL INVESTIGATION 12

CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

CASES

Beecham v. United States,
511 U.S. 368 (1994) 10

Bond v. United States,
No. 12-158 (June 2, 2014) 11, 12

Circuit City Stores, Inc. v. Adams,
532 U.S. 105 (2001) 10

Edison v. Douberly,
604 F.3d 1307 (11th Cir 2010) 10

Sykes v. United States,
131 S. Ct. 2267 (2011) (Scalia, J.,
dissenting) 7

STATUTES

18 U.S.C. § 1519 (2012) ..... passim

OTHER AUTHORITIES

148 Cong. Rec. S7418-01 (2002) 9

Brian Walsh and Tiffany Joslyn, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law* 3, 6

Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 Geo. L.J. 1435, 1437 (2009) 4

Hearing Tr. Over-Criminalization Task Force of 2013, Serial No. 113-44, at 21-22 (June 14, 2013) 7, 8

James A. Strazzella, *The Federalization of Criminal Law*, Criminal Justice Section, American Bar Association, 1998..... 6

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The National Association of Criminal Defense Lawyers, Inc. submits the following Certificate of Interested Persons and Corporate Disclosure Statement pursuant to FRAP 26.1. The following persons and entities have an interest in the outcome of this appeal in addition to those previously identified by the parties in their briefs:

National Association of Criminal Defense Lawyers, Inc.
American Fuel & Petrochemical Manufacturers
Holland & Knight LLP
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The National Association of Criminal Defense Lawyers, Inc. is a not-for-profit corporation headquartered in Washington, DC. It has no parent corporation and no stock.

INTEREST OF AMICI CURIAE

This brief is submitted on behalf of the National Association of Criminal Defense Lawyers ("NACDL") and The American Fuel & Petrochemical Manufacturers ("AFPM") as *amici curiae* in support of the Petitioner in *United States v. Yates*, on petition for writ of certiorari.[1]

NACDL, a non-profit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's approximately 10,000 direct members in 28 countries—and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

NACDL has frequently appeared as *amicus curiae* before this Court, the federal courts of appeals, and the highest courts of numerous states. In furtherance of NACDL's mission to safeguard fundamental constitutional rights, the Association often appears as *amicus curiae* in cases involving

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[1] Pursuant to Rule 29(c)(5), counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or its counsel made a monetary contribution to its preparation or submission.

overcriminalization, over-federalization, and prosecutorial abuse.

AFPM is a national trade association of more than 400 companies, including virtually all U.S. refiners and petrochemical manufacturers. AFPM members operate 122 U.S. refineries comprising approximately 98% of U.S. refining capacity. AFPM petrochemical members support about 1.4 million American jobs, including about 214,000 employed directly in petrochemical manufacturing plants. AFPM members operate in a highly regulated environment and could be adversely impacted by overcriminalization and the expansive reading of the anti-shredding provisions at issue in the case at bar.

NACDL and AFPM appear as friends of the Court to provide a broader perspective of the vast implications arising from the overcriminalization of offenses at the executive level. With NACDL's long history championing the interests of criminal defendants wrongly convicted, NACDL respectfully suggests that its views may assist the Court in this matter.

SUMMARY OF THE ARGUMENT

Before this Court is the case of a commercial fisherman and three missing grouper.[2] At the heart of the issue presented is an unconstitutional expansion of federal law, resulting in Petitioner's

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[2] Pursuant to Rule 37, counsel for NACDL states that counsel of record was notified of NACDL's intent to file an *amicus* brief under this Rule. The Solicitor General and Petitioner's counsel have consented to this filing.

wrongful conviction. Petitioner's conviction is but one more example of the overcriminalization epidemic.

Overcriminalization places a growing burden on the administration of justice, often resulting in ludicrous federal convictions for conduct that, traditionally, falls outside constitutionally anticipated federal purview. In recent years, NACDL, and others, as *amicus curiae*, have brought the overcriminalization epidemic to the attention of the federal courts. Ordinarily, overcriminalization describes laws that are drafted with vague or overbroad language, preventing fair notice to the alleged offender. The overcriminalization attack is commonly asserted against Congress; i.e., those who draft the laws are to blame. But overcriminalization also includes instances where the *executive* branch uses criminal provisions in specific laws and regulations in ways never intended by Congress. For instance, improper prosecutorial discretion can result in the expansion of federal criminal law beyond legislative predictions where so-called "process crimes" are brought against defendants rather than charges directly relating to the underlying offense. The result is an overcriminalized society by virtue of executive overreach. This is squarely demonstrated in the instant appeal.

Indeed, NACDL has long argued that "expansive and ill-considered criminalization has cast the nation's criminal law enforcement adrift from [its] anchor." Brian Walsh and Tiffany Joslyn, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law*, The

Heritage Found. & NACDL, April 2010, at forward, VI. Thus, with overcriminalization as a guidepost, *amici curiae* urge this Court to reverse the Petitioner's conviction for the legal errors committed in the district court. As a matter of law, the Petitioner could not have been adjudicated guilty under 18 U.S.C. § 1519 (2012), because the application of an anti-shredding statute to three rotten fish is an unconstitutional expansion of the law and a violation of statutory construction.

ARGUMENT

I. PETITIONER'S CONVICTION UNDER SARBANES-OXLEY EXEMPLIFIES OVERCRIMINALIZATION THROUGH AN UNCONSTITUTIONAL EXPANSION OF THE LAW.

An overly broad construction of 18 U.S.C. § 1519 (2012) injures the integrity of the criminal justice system. Section 1519 is part of a class of "process crimes" that focus on offenses "not against a particular person or property, but against the machinery of justice itself." Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 Geo. L.J. 1435, 1437 (2009). In particular § 1519 provides:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any *record, document, or tangible object* with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the

> jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

(emphasis added). Section 1519 is also part of the Sarbanes-Oxley Act of 2002, described as "An [a]ct [t]o protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes." Sarbanes-Oxley Act of 2002, PL 107–204, 116 Stat 745. Section 801 of the Sarbanes-Oxley public law, short-titled the "Corporate and Criminal Fraud Accountability Act of 2002," introduced § 1519 into law, under the sub-heading "criminal penalties for altering documents."

It should come as no surprise, then, that at least one of the drafters noted that § 1519 was designed to respond to the Enron-related shredding of audit documents which was beyond the reach of existing obstruction of justice statutes. *See* 148 Cong. Rec. S1785–86 (daily ed. March 12, 2002) (statement of Sen. Leahy). But the matter of *Yates v. United States* does not involve a corporation, or any business entity for that matter. Nor does it involve a document or record. Rather, it involves three fish. The absurdity of this factual scenario, unfortunately, is all too common in today's overcriminalized society.

A. THE OVERCRIMINALIZATION EPIDEMIC

Today, it is seemingly impossible to list all of the federal criminal statutes and regulations currently in existence. Walsh & Joslyn, at 2-4, 6. In the late 1980s, the Department of Justice suggested there were more than 3,000 federal criminal laws. *See* James A. Strazzella, *The Federalization of Criminal Law*, Criminal Justice Section, American Bar Association, 1998, at 94. That number now stands near 10,000. Walsh & Joslyn, at 6-7. (citing an American Bar Association Task Force estimation from 1998). The American Bar Association's report also found more than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970. *Id.* at 7. Extrapolated, this means that the amount of federal criminal provisions enacted in the twenty-six year period between 1970 and 1996 was almost equivalent to the amount of federal criminal provisions enacted in the preceding 106 years. Alarmingly, this trend continues.

Justice Scalia recently described the plight facing the Petitioner, and so many like him, in finding that "[w]e face a Congress that puts forth an ever-increasing volume of laws in general, and of criminal laws in particular. It should be no surprise that as the volume increases, so do the number of imprecise laws. And no surprise that our indulgence of imprecisions that violate the Constitution encourages imprecisions that violate the Constitution. Fuzzy, leave-the-details-to-be-sorted-out-by-the-courts legislation is attractive to the

Congressman who wants credit for addressing a national problem but does not have the time (or perhaps the votes) to grapple with the nitty-gritty. In the field of criminal law, at least, it is time to call a halt." *Sykes v. United States*, 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting).

In this case, the continued emergence of a new form of overcriminalization is exposed—wherein the executive branch overextends process crimes to prosecute individuals instead of under the statutes or regulations they were initially investigated under; i.e., over/undersized fishing. In these cases, defendants may be exposed to penalties far in excess of those penalties set by Congress for the underlying crime, and prosecutors are relieved of the burden of proving the elements of the underlying offense. Thus, with Congress overcriminalizing through the enactment of laws, which are later exacerbated through agency regulations, and the executive branch arresting and prosecuting individuals for acts not contemplated in already overly broad process crimes, the criminal justice system is overburdened.

B. CONGRESSIONAL TASK FORCE ON OVERCRIMINALIZATION

The nation's overcriminalization concerns were presented to a bi-partisan congressional judicial committee task force in 2013, specifically created to address the overcriminalization phenomenon. *See* Hearing Tr. Over-Criminalization Task Force of 2013, Serial No. 113-44, at 21-22 (June 14, 2013). William Shepherd (counsel for NACDL herein), and Florida's former Statewide Prosecutor,

discussed the facts of this very case in response to a question from a Member of Congress, whose dismay was a prime example of how executive decisions leading to overcriminalization are an unwarranted expansion of Congress's intent. *Id.* Mr. Shepherd explained that though Mr. Yates was prosecuted under a criminal law drafted by Congress, "my guess would be that Congress had no idea that a post-Enron anti-document-shredding statute would be used to convict a man of destroying three red grouper." *Id.* at 22. Several other legal scholars and practitioners testified on similar matters before the overcriminalization task force, all of varying political persuasions, but cohesive in the main message: more and more criminal defendants are deprived of fair notice.

Ironically, perhaps, is that to this day the government cannot even tell its citizens how many crimes are on the federal books. Nor can the Congressional Research Service (CRS) so inform the Chairman of the House Subcommittee on Crime, Terrorism, and Homeland Security, because as Congressman John Sensenbrenner stated at the June 14, 2013 overcriminalization committee hearing referenced above, "CRS's initial response to our request [for a listing of all federal crimes] was that they lack the manpower and resources to accomplish this task. . . . I think this confirms the point that all of us have been making on this issue and demonstrates the breadth of overcriminalization."

C. EXECUTIVE EXPANSION OF 18 U.S.C. § 1519 TO INCLUDE RED GROUPER FURTHERS THE OVERCRIMINALIZATION EPIDEMIC

If § 1519 is read to encompass the destruction of fish, then the statute truly knows no bounds. It is up to the courts, as the gatekeepers, to ensure that congressional laws are not abused by the executive branch to criminalize conduct not contemplated under the applicable statute. Here, there are several fundamental concerns present in the government's approach to § 1519. First, § 1519 is a process crime. As discussed above, the government has been relying on this process crime, and similar process crimes, for retrieving convictions on individuals that would likely not be convicted under the underlying statute that was the cause of the investigation. Indeed, here, the Petitioner was not charged with violating any statutory provision specific to fishing. Second, there is clear language in the Congressional Record that § 1519 is an "anti-shredding provision" and that "[t]he intent of the provision is simple; people should not be destroying, altering, or falsifying documents to obstruct any government function." 148 Cong. Rec. S7418-01, S7419 (2002). Third, this provision was passed after public pressure was placed on Congress to ensure that situations like Enron would not arise again in the future; it is no coincidence that the provision came into being less than a full year after Enron was exposed. And last, the government ignores the threat that such an over-expansion of the statute can have on everyday citizens living their everyday lives.

1. Red Grouper are Not "Tangible Objects" under Sarbanes-Oxley

Section 1519 is inapplicable to the Petitioner because it provides criminal sanctions for persons that knowingly destroy or alter any "record, document, or tangible object" with the intent to impede a federal investigation—red grouper is not a document, record, or tangible object as envisioned in § 1519. *See* 18 U.S.C. § 1519 (2012). *Ejusdem generis*, one of the more powerful canons of statutory constructions recognized by this Court, provides where "general words follow specific words in a statutory enumeration, the general words are to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-115 (2001). Where "several items in a list share an attribute," *ejusdem generis* "counsels in favor of interpreting the other items as possessing that attribute as well." *Beecham v. United States*, 511 U.S. 368, 371 (1994). Moreover, under the maxim of *noscitur a sociis*, "a word is known by the company it keeps." *Edison v. Douberly*, 604 F.3d 1307, 1309 (11th Cir 2010) (internal quotation and citation omitted). Finally, the government would have this Court believe that a fish is like a record or a document, but it ignores Congress's own admission that § 1519 is an "anti-shredding" statute designed to prevent the conduct used in the Enron investigation and like cases. This anti-shredding intent would naturally flow to certain "tangible objects," such as computers, disks, and flash drives, because deleting information from those items is akin to an electronic document shred. But the

aforesaid canons of construction, when paired with Congress's unambiguous intent to create a stronger anti-document-shredding provision, expose the government's assertion that fish are among the "tangible objects" contemplated under § 1519 as nothing more than an attempt to expand the statute's reach as an unconstitutional means to overcriminalize.

2. Bond v. United States

This Court recently reviewed another case that exemplified overcriminalization in the matter of *Bond v. United States*, No. 12-158 (June 2, 2014). The issue in *Bond* was whether the Chemical Weapons Convention Implementation Act of 1998, enacted to combat terrorism and the use of weapons of mass destruction, applied to an "amateur attempt by a jilted wife to injure her husband's lover, which ended up causing only a minor thumb burn readily treated by rinsing with water." *Id.* at 1. Federal prosecutors charged Bond with possessing and using a "chemical weapon" in violation of the Implementation Act. Bond issued a guilty plea with appellate rights reserved, and was sentenced to a prison term, fines, and restitutionary damages.

This Court reversed the convictions under the Implementation Act, finding that "the Government's reading of section 229 would transform a statute concerned with acts of war, assassination, and terrorism into a massive federal anti-poisoning regime that reaches the simplest of assaults. In light of the principle that Congress does not normally intrude upon the States' police power, this Court is

reluctant to conclude that Congress meant to punish Bond's crime with a federal prosecution for a chemical weapons attack." *Id.* at *syllabus*.

Like the Implementation Act in *Bond*, if § 1519 was drafted to include red grouper, then the overbreadth of the statute alone creates constitutional concerns. Finally, because the post-*Enron* enactment of § 1519 suggests that red grouper were not among the tangible items contemplated by that anti-white collar crime effort (like disks and CDs), its expansion to grouper in this case is indicative of prosecutorial creep and is an unauthorized executive expansion of the law. Overcriminalization cannot be combated effectively if the executive branch expands criminal laws that are already overly broad. The courts must continue to perform their role to protect individual liberties and refuse to apply § 1519 to unspecified areas—in this case, grouper.

D. EVEN IF SARBANES-OXLEY APPLIES TO FISH, YATES' CONDUCT DID NOT IMPEDE, OBSTRUCT, OR INFLUENCE A FEDERAL INVESTIGATION

The matter of *Yates v. United States* provides ample opportunity for legal practitioners and scholars to debate issues such as legislative intent, governmental overreach, and statutory construction. And these issues/concerns are undoubtedly important to consider (indeed, NACDL writes as a friend of the court to provide its perspective on several of these important issues). But, perhaps this

Court need only consider the Government's admission in the lower courts that Yates' prosecution for obstruction was based entirely on *three* missing fish. That is, the federal agent that boarded the *Miss Katie* counted 72 undersized red grouper at sea, but only 69 undersized red grouper were onboard the *Miss Katie* at port. There is no federal law or regulation governing undersized fishing that distinguishes, in any manner, a fisherman with allegedly 69 undersized fish on board from a fisherman with allegedly 72 undersized fish on board. Therefore, the Government could not have met an essential element of a § 1519 conviction, because three missing fish would not (and could not) "impede, obstruct, or influence" Yates' investigation.

CONCLUSION

For the foregoing reasons, *amici curiae*, NACDL, respectfully asks this Court to reverse the Petitioner's § 1519 conviction.

Respectfully submitted,

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July 7, 2014

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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Supreme Court of the United States

JOHN L. YATES,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

A provision of the Sarbanes-Oxely Act, 18 U.S.C. § 1519, entitled "Destruction, alteration or falsification of records in Federal Investigations and bankruptcy," makes it a crime to "knowingly alter[], destroy[], mutilate[], conceal[], cover up, falisf[y], or make a false entry `in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter..."

The question presented is whether this provision makes it a crime to destroy a fish during the course of a National Marine Fisheries Service investigation, or whether the statute prohibits only destruction of records, documents and similar communicative materials?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES vi

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. Overcriminalization is a Growing Problem in America 6

A. The Ever-Expanding Universe of Criminal Liability 7

B. The Injustice of Overcriminalization 10

II. The Government Seeks to Convert an Ostensible Financial Regulation into a Far-Reaching Prosecutorial Tool 11

A. The Far-Reaching Implications of an Unbounded Interpretation in Future Anticipatory Obstruction Cases 13

1. The "In Contemplation" Language is Troublesomely Vague..... 13

2. The "In Contemplation" Language has Been Applied to Prosecute for Destruction of Files Where Defendant Lacked Specific Knowledge of an Existing Investigation..... 15

3. An Unbounded Interpretation of "Tangible Object," Will Impose Burdensome and Indefinite Retention Requirements on Businesses..... 17

B. An Unbounded Interpretation of "Tangible Object" Invites Pretextual Prosecutions 19

C. The Mere Threat of Prosecution Under the Arthur Anderson Provision Can be Devastating for a Small Business 21

III. Congress Could Not Have Intended to Require Businesses to Incur Costs for Retention of Products, Inventory and Other Non-Communicative Items 22

A. Sarbanes-Oxley Compliance Costs are Already Staggering When Understood Only as Requiring Document Retention Programs 23

B. An Unbounded Interpretation of "Tangible Object" Would Radically Increase Retention Costs for Business 24

C. Congress Should Not be Presumed to Have Imposed Such Heavy-Handed Burdens on Business 28

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

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515 U.S. 593 (1995) 14

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404 U.S. 336 (1971) 29

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642 F.3d 371 (2d Cir. 2011) 17

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(D. Conn. 2007) 15, 21, 27

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RULE

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INTEREST OF AMICUS CURIAE[1]

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

NFIB represents 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files

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[1] Counsels of record have consented to the filing of this brief. The Petitioner has filed a blanket consent. And a letter evidencing Respondent's consent is filed herewith. In accordance with Rule 37.6, NFIB Legal Center states that no counsel for a party authorized any portion of this brief and no counsel or party made a monetary contribution intended to fund the brief's preparation or submission.

amicus briefs in cases that will impact small businesses. We seek to file in this case out of concern that the United States has taken an overly aggressive interpretation of a criminal statute in a manner that broadens its scope to include conduct that Congress could not have intended when enacting the Sarbanes-Oxley Act. When read in context, *Amicus* maintains that the criminal prohibition at issue in this case should be understood as prohibiting the destruction of financial records, documents and similar files that might be incriminating in a federal investigation. Accordingly, we file here to ensure that small business owners will not be caught in a criminal net that Congress never cast. More fundamentally, we file in this case to raise small business concerns over any interpretive approach that might have the unintended consequence of radically amplifying the scope of an arcane criminal prohibition. As explained in this filing, it is already difficult enough for small business owners to understand the law without extrapolating obscure federal provisions to the limits of reason.

SUMMARY OF ARGUMENT

The NFIB Legal Center previously filed in *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014), urging this Court to cabin the scope of whistle-blower protections in the Sarbanes-Oxely Act, so as to limit their reach to cover only employees of publically-traded corporations. In that case, our preferred interpretation was rejected because—in the context of the Act as a whole, and in consideration of its purposes—Justice Ginsberg, writing for the

majority, concluded that it made sense to resolve the statutory ambiguity in a manner that would apply whistle-blower protections both to the employees of publically traded companies and those contractors working with such companies.[2] The Court emphasized that this interpretive approach made sense because Sarbanes-Oxely was designed to "safeguard investors in public companies and [to] restore trust in the financial markets following the collapse of Enron Corporation..." *Id.* at 1161.

Of course, there was at least room to argue as to whether Congress could have seriously *contemplated* that Sarbanes-Oxely might govern independent businesses in that case because—as with the Enron scandal—*Lawson* dealt with fraudulent business conduct that would potentially affect investors. *Lawson*, 134 S. Ct. at 1161. By contrast, the present case asks whether Sarbanes-Oxely's criminal provisions should be construed as applying to a commercial fisherman who destroyed wildlife—*three little fish*. This is patently absurd. One might reasonably expect National Marine Fisheries Service, or Fish and Wildlife Service, regulations to address such conduct. But one would not reasonably expect an obscure criminal provision,

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[2] In *Lawson*, the dissent expressed deep concern that the Court had expanded the reach of Sarbanes-Oxley beyond what context would allow. *Lawson*, 134 S. Ct. at 1178 (J. Sotomayor dissenting) ("Congress was of course free to create this kind of sweeping regime that subjects a multitude of individuals and private businesses to litigation over fraud reports that have no connection to, or impact on, the interests of public company shareholders. But because nothing in the text, context, or purpose of the Sarbanes–Oxley Act suggests that Congress actually wanted to do so, I respectfully dissent.").

from an Act intended to address corporate governance and financial affairs, to govern handling procedures for a red grouper caught in the Gulf of Mexico.

Section 1519 of Sarbanes-Oxely, entitled "Destruction, alteration or falsification of records in Federal Investigations and bankruptcy," makes it a crime to "knowingly alter[], destroy[], mutilate[], conceal[], cover up, falisf[y], or make a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter..." Setting aside the possibility that this criminal prohibition may be limited by its contextual construction, the United States contends that the term "tangible object" should be given the most expansive definition possible. On reading Section 1519, one might reasonably think the prohibition applied only to financial records, documents and other such *files* that might be incriminating if uncovered in an investigation. Yet in the view espoused by the United States, the prohibition applies to any physical object—fish, widgets, bubble-gum, *anything*—regardless of how attenuated it may be from the sort of concerns that Congress had in mind when enacting Sarbanes-Oxely.

Amicus submits that this is a nebulous attempt to extrapolate the reach of Section 1519 beyond what Congress envisioned. Government should not be permitted to convert an ostensible financial regulation into a far-reaching prosecutorial tool, applicable in *any* federal investigation—certainly not run-of-the mill administrative

inspections. If prosecutors are permitted to take such a liberal approach to statutory construction, the citizens are right to fear that *nothing is plain*. Indeed such an approach turns the rule of lenity on its head.

For small business owners swimming in a sea of regulation, there is already a growing sense that it is impossible for reasonably prudent individuals to be sure of what the law demands—and to remain fully compliant with the estimated 300,000 regulations on the federal books. This is an especially serious concern when federal prosecutors begin ignoring context to construe a *criminal statute* more broadly than reasonable individuals would anticipate. For these reasons, the NFIB Legal Center submits that overcriminalization is a serious problem in America.

In this case the broad interpretation espoused by the United States would be especially problematic in that it would expose businesses to potential criminal prosecutions for failing to retain products, inventory or *any physical item* that might potentially be relevant in an administrative inspection of any sort. This would be most burdensome for small businesses, as they may be required to incur major expenses in warehousing such items indefinitely. And in those frequent cases where it is unclear as to whether the business has complied with federal regulations, this would force businesses to warehouse all sorts of items merely as a prophylactic measure—to avoid *risk* of prosecution under Sarbanes-Oxley. This would result in socially unconstructive ends, as it would require businesses

to expend limited resources preserving evidence of (often unwitting) regulatory violations—resources that would be better served investing in compliance programs and in growing business operations.

Such results should not be inferred lightly. *Amicus* beleive that Congress did not intend to impose such heavy-handed burdens on small business—or to hang a perpetual Damoclean Sword over an individual's head whenever there has been a potential mistake. To be sure, an Act intended to address financial fraud should not be contorted to give an open-ended prosecutorial tool for government to enforce—with an iron fist—the entire universe of administrative regulations governing economic conduct in America.

ARGUMENT

I. Overcriminalization is a Growing Problem in America

This case vividly illustrates the serious overcriminalization problem that permeates the American legal system today.[3] Here the United States has employed a technical provision in a financial disclosure statute to prosecute Petitioner, John Yates ("Yates"), for destroying evidence that he may have violated federal fishing regulations at sea. The United States advances the broadest possible

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[3] *See* Greta Fails, *The Boundary between Zealous Advocacy and Obstruction of Justice after Sarbanes-Oxley*, 68 N.Y.U. Ann. Surv. Am. L. 397, 430 (2012)("[T]he implications of courts' broad interpretations of section 1519 and prosecutors' willingness to push the reach of the Sarbanes-Oxley obstruction of justice provisions . . are worrisome.").

interpretation of Section 1519 of Sarbanes-Oxely in a manner that would convert the provision from a measure designed to prevent individuals from obstructing discovery of financial fraud into an open-ended prosecutorial tool that could be employed in the context of any conceivable federal investigation. This liberal approach to statutory construction contributes to the growing problem of overcriminalization in America.

In broad terms, "overciminalization" can be defined as the "use of the criminal law to punish conduct that traditionally would not be deemed blameworthy." Paul Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 Harv. J. L. & Pub. Pol. 716, 719 (2013).[4] The problem is plainly illustrated by the ever-growing growing breadth and scope of the federal criminal system. But if Section 1519 of Sarbanes-Oxely is interpreted as criminalizing the destruction of any conceivable tangible object that might be relevant in *any future inspection*, the universe of potential criminal conduct will expand exponentially.

A. The Ever-Expanding Universe of Criminal Liability

It is difficult to quantify the complete universe of criminal law. Whereas at common law it was relatively easy to know and avoid criminal conduct, in the 21st Century it is impossible to put a number on an exhaustive list of potential criminal acts. But

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[4] *Available* online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2302913 (last visited 6/27/14).

all estimates recognize that the universe of criminal law is ever-expanding.

In 1998, the American Bar Association (ABA) reported that there were in excess of 3,300 separate federal criminal offenses. *See* American Bar Association, *The Federalization of Criminal Law*, Appendix C, 99 (1998) ("ABA Report").[5] A more recent estimate put that number at 4,450. Harvey A. Silverglate, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT, 202 (Encounter Books, 2009). More than 40 percent of these laws have been enacted in the past 30 years, as part of the growth of the regulatory state. ABA Report, *supra*, at 7; Larkin, 36 Harv. J. L. & Pub. Pol. at 729 n.58. These laws are scattered throughout 50 titles of the United States Code, encompassing roughly 27,000 pages. *See* Ronald Gainer, *Federal Criminal Code Reform: Past and Future*, 2 Buff. Crim. L. Rev. 46, 57 (1998).

Worse, the statutory code sections often incorporate by reference the provisions and sanctions of administrative regulations promulgated by various agencies under congressional authorization. Estimates of how many such regulations exist are even less settled, but the ABA has placed the number around 10,000. ABA Report, *supra*, at 10. Further, if regulations "enforceable in criminal prosecutions are included, the number of potentially relevant federal laws could exceed

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[5] *Available* online at http://www.americanbar.org/content/dam/aba/publications/criminaljustice/Federalization_of_Criminal_Law.authcheckdam.pdf (last visited 6/27/14).

300,000." Larkin, 36 Harv. J. L. & Pub. Pol. at 729 n.55 (citing Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 Geo. L. J. 2407, 2441-42 (1995)).

Most of these 300,000 "potentially relevant" laws are "properly characterized as *malum prohibitum*—wrong because prohibited [as opposed to those prohibitions justified by the force of moral compulsion and near universal social consensus]." Julie R. O'Sullivan, *The Federal Criminal Code Is a Disgrace: Obstruction Statutes as a Case Study*, 96 J. Crim. L. & Criminology 643, 657 (2005-2006). And the bulk of those *malum prohibitum* offenses stem from "the twentieth century pursuit of 'regulatory crimes,'" such as those governing commerce, finance, the environment, and public health. Larkin, 36 Harv. J. L. & Pub. Pol. at 728. The dangers of the "shift[ ] from the *malum in se* to the *malum prohibitum* framework" are manifold:

> 'it necessarily shifts its ground from a demand that every responsible member of the community understand and respect the community's moral values to a demand that everyone know and understand what is written in the statute books'. . . . . [As laws become] too confusing and impractical, they also become useless and unjust.[6]

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[6] Harvey A. Silverglate & Monica R. Shah, *The Degradation of the "Void for Vagueness" Doctrine: Reversing Convictions While Saving the Unfathomable "Honest Services Fraud,"* 2009-2010 Cato Sup. Ct. Rev. 201, 220 (2010) (internal citations omitted).

B. The Injustice of Overcriminalization

In an age where there are so many criminal prohibitions it is often impossible for reasonable individuals to know the law. Though the law generally presumes otherwise, the reality is that individuals are often oblivious of the criminal implications of their conduct. Indeed, while some of criminal prohibitions may be well publicized and generally known, many others remain obscure pitfalls for unwitting (often perfectly reasonable) individuals. For all of these reasons, NFIB Legal Center submits that overcriminalization is "*the most pressing problem* with the criminal law [system] today." Stephen Smith, *Overcoming Overcriminalization*, 102 J. Crim. L. & Criminology 537, at 538. (2013) (quoting Douglas Husak, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 3 (2007)).

Moreover, many crimes are "poorly defined in ways that exacerbate their already considerable breadth and punitiveness, maximize prosecutorial power, and undermine the goal of providing fair warning of the acts that can lead to criminal liability." *Id.* at 565. Even more alarming, some statutory crimes limit, or entirely do away with, the *mens rea* requirement. *Id.* at 568-74. Others impose disproportionately severe penalties for ostensibly insignificant crimes. *Id.* at 574-76. All of this contributes to the problem of overcriminalization.

II. The Government Seeks to Convert an Ostensible Financial Regulation into a Far-Reaching Prosecutorial Tool

The Sarbanes-Oxley Act was ostensibly designed to "protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to securities laws..." Pub. L. No. 107–204, 116 Stat. 745 (2002). The Act on the whole was a response to the Enron debacle. *Lawson*, 134 S. Ct. at 1162. To be sure, Section 1519 was included as a direct response to conduct of the "Big Five" accounting firm Arthur Andersen, which was charged with obstruction of justice after shredding Enron documents in anticipation of a possible investigation by the U.S. Securities and Exchange Commission. Dana E. Hill, *Anticipatory Obstruction of Justice: Pre-Emptive Document Destruction Under the Sarbanes-Oxley Anti-Shredding Statute, 18 U.S.C. S 1519*, 89 Cornell L. Rev. 1519, 1521, 48 (2004) (explaining that Section 1519 was designed to address the facts of *Arthur Andersen, LLP v. United States*, 544 U.S. 696, 707-08 (2005), and describing Section 1519 as an "anti-shredding provision"). For this reason Section 1519 might likewise be referred to as the "Arthur Anderson Provision."

Entitled "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy," Section 1519 states:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede,

> obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

But the United States seeks to apply this criminal provision far beyond the realm of financial regulation and corporate governance. In this case, the United States would apply the Arthur Anderson Provision to authorize prosecution of a man who destroyed three red groupers during the course of a National Marine Fisheries Service investigation. To justify this prosecution, the Justice Department applies the broadest conceptual construction imaginable.

Indeed, the United States seeks to apply an unbounded construction of "tangible objects." Such an approach would greatly multiply the provision's leverage. This is especially true to the extent the United States seeks a dual expansion of the "in contemplation of" clause—an approach that seemingly neuters the *mens rea* requirement.

As other commentators have noted, the Government has already greatly attenuated the "in contemplation of" standard. This has "generate[d] an entirely new area of obstruction of justice law—that of anticipatory obstruction." Kyle R. Taylor, *The Obstruction Justice Nexus Requirement After Arthur Andersen and Sarbanes-Oxley*, 93 Cornell L. Rev.

401, at 426 (2008). The reach of this new criminal prohibition threatens to be "vast." Fails, 68 N.Y.U. Ann. Surv. Am. L. at 411.

A. The Far-Reaching Implications of an Unbounded Interpretation in Future Anticipatory Obstruction Cases

1. The "In Contemplation" Language is Troublesomely Vague

Arthur Andersen, LLP v. United States, 544 U.S. 696 (2005), provides a "roadmap for subsequent judicial interpretation of Section 1519's 'in contemplation of' language." Robert Buchholz, *When Your Best Friend Is Your Worst Enemy: How 18 U.S.C. § 1519 Transforms Internal Investigations Into State Action and Unexpected Waiver of Attorney-Client Privilege*, 46 N. Eng. L. Rev. 811, at 830 (2012).[7] In *Arthur Andersen*, this Court reversed a conviction of an in-house attorney charged with "corruptly persuad[ed]" "another person" on legal issues pertaining to an Enron earnings release. *See* O'Sullivan, 96 J. Crim. L. & Criminology at 679, 694-697 (for summary of jury finding). The *Arthur Andersen* Court held that the jury instructions failed to "convey the requisite consciousness of wrongdoing[,]" and that the prosecution was required to point to a 'nexus' between the obstructive act and the proceedings—a link that must be

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[7] *Available* online at http://www.nesl.edu/userfiles/file/lawreview/Vol46/4/Buchholz%20-%20Final.pdf (last visited 6/27/14).

established to ensure a defendant has acted with the "'requisite intent to obstruct.'" *Arthur Anderson*, 545 U.S. at 707-708 (quoting *United States v. Aguilar*, 515 U.S. 593, 599 (1995)).[8]

In contrast to traditional obstruction of justice statutes, it is obvious that Section 1519 dilutes the nexus requirement, yet the *mens rea* requirement is not clearly specified. *See U.S. v. McRae*, 702 F.3d 806, at 837 (5th Cir. 2012) (Section 1519 suffers from "awkward wording"). Whereas previous obstruction statutes had required a clear showing that the defendant was "conscious of their wrongdoing,"[9] the Arthur Anderson Provision encompasses acts committed with knowledge as little as "in relation to or contemplation of a future proceeding," Fails, 68 N.Y.U. Ann. Surv. Am. L. at 405. This weakens the scienter and "nexus" requirements. *Id.* at 413 (Section 1519 is a "radical departure" from "the pre-Sarbanes-Oxley obstruction of justice scheme"). But, the precise degree of "prescience"[10] and culpability required is far from resolved. Robert Buchholz, *When Your Best Friend Is Your Worst Enemy: How 18 U.S.C. S 1519 Transforms Internal Investigations*

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[8] *See* Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 Geo. L.J. 1435, 1475 n. 221 (2009), *supra*, at ("[T]he Supreme Court in *United States v. Aguilar* held that § 1503 required a nexus between the obstructive activity and the administration of justice. The Court applied the same rule again in the *Arthur Andersen* case, even though it was prosecuted under § 1512, which has less favorable language.") (internal citations omitted).

[9] *See Arthur Andersen*, 545 U.S. at 706.

[10] *See* Silverglate, supra, at 142 ("How prescient does a lawyer need to be?").

into State Action and Unexpected Waiver of Attorney-Client Privilege, 46 New Eng. L. Rev. 811, 824-25 (2012) (noting "there is no consensus regarding how § 1519's "in contemplation" language should be interpreted."); Fails, 68 N.Y.U. Ann. Surv. Am. L. at 410-11 (observing that "[s]ome courts have firmly read an Arthur Andersen 'corruptly' requirement into the 'knowingly' language of section 1519, requiring knowledge of conscious wrongdoing as opposed to the mere honest intent to impede a proceeding[,] [while] [m]any courts ... have neglected to fully flesh out the requirement, simply stating that section 1519 requires intent to obstruct."); *see also* Silverglate, *supra*, at 163 (surmising that "anything that the lawyer does that makes the prosecutor's job harder is seen as a crime").

2. The "In Contemplation" Language has Been Applied to Prosecute for Destruction of Files Where Defendant Lacked Specific Knowledge of an Existing Investigation

United States v. Russell illustrates that federal prosecutors have—and likely will continue—to take an aggressive interpretation of Section 1519's *mens rea* requirement. 639 F Supp. 2d 226 (D. Conn. 2007). In that case, defendant Russell, a respected attorney for a small local church, destroyed a laptop containing child pornography, which had been used by a choirmaster. *Russell*, 639 F. Supp. 2d at 230; *see also* Fails, 68 N.Y.U. Ann. Surv. Am. L. at 423 n.123,

429. Russell received the laptop from a church employee who discovered the illicit material.

Given that mere possession of a computer containing child pornography constitutes a crime, Russell faced a Hobson's choice: either risk potential prosecution for possessing the computer,[11] or hand the computer over to the government—a choice that he believed would violate the attorney-client privilege. Silverglate, *supra*, at 160.[12] Faced with that intractable dilemma, Russell destroyed the computer. He did so without knowledge that the authorities had already initiated an investigation into the matter. Fails, 68 N.Y.U. Ann. Surv. Am. L. at 423 n.123.

When it was discovered that Russell had destroyed the computer, he was indicted for anticipatory obstruction under the Arthur Andersen provision on the theory that the computer was destroyed in anticipation that an investigation might—at some point—take place. The prosecutor in that case argued that Section 1519 "does not require corrupt intent..." Silverglate, *supra*, at 164. If federal prosecutors continue to hold this line—

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[11] The government acknowledged that possession of the laptop was illegal. *See* Silverglate, *supra*, at 164; 18 U.S.C. § 2252 (2006).

[12] Another obstruction provision, 18 U.S.C. § 1512(c)(1), may create a similar quandary for defendants in drug cases. *See* Sarah O'Rourke Schrup, *Obstruction of Justice: Unwarranted Expansion of 18 U.S.C. § 1512(C)(1)*, 102 J. Crim. L. & Criminology 25, at 56 (2013) ("For example, if the statute is extended to drug arrests, defendants will be required to continue possessing contraband in violation of federal law instead of lawfully destroying it, to act criminally rather than lawfully abandon a prior illegal pursuit").

prosecuting individuals for destroying "tangible objects" that might be relevant to future investigations—there will be major ramifications for the business community.[13] And as detailed *infra*, those ramifications will be much greater if the term "tangible object" is given an unbounded interpretation to include any physical evidence of a regulatory violation.

3. An Unbounded Interpretation of "Tangible Object," Will Impose Burdensome and Indefinite Retention Requirements on Businesses

Should this Court interpret "tangible object[s]" in Section 1519 to encompass the entire universe of physical objects that might be *potentially relevant in future investigations*, businesses will face a Hobson's choice anytime they become aware of a *potential* regulatory violation. The business must either: (a) retain all potentially relevant physical evidence, and risk an enforcement action if the evidence is ever discovered; or (b) discard the evidence in the course of usual business, therein risking potential prosecution under the Arthur Andersen provision. They face the ire of an enforcement action or criminal prosecution no matter how they should proceed.

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[13] *See United States v. Gray*, 642 F.3d 371, 378 (2d Cir. 2011) (explicitly rejecting the District Court's conclusion in *Russell* that there must be a "nexus between a defendant's conduct and an official [investigative] proceeding").

The first choice is severely burdensome because the business must find somewhere to safely store whatever items are in question *for an indefinite period* into the future. And even this risks potential criminal liability if a decision to store those items might be viewed as an attempt to conceal. Further, the decision to indefinitely retain such items is unpalatable because the business must operate under the specter that Damaclian's Sword might fall, at any moment, in the course of an administrative inspection. Yet the business must live with the threat of an ever impending civil enforcement action, or risk far worse criminal penalties for anticipatory obstruction.

The magnitude of the burden imposed on business should not be underestimated. Given that there are an estimated 300,000 federal regulations on the books, it is not uncommon for businesses to unwittingly violate a regulation, or to be unsure as to whether they have—or have not—been fully compliant with every rule. In such cases, businesses would be forced to play a guessing game as to whether they will risk prosecution if they should dispose of products, inventory or other non-communicative materials. Rather than playing Arthur Anderson Roulette, many businesses will feel compelled to incur costs and inefficiencies in maintaining such items into the indefinite future as a prophylactic matter. This would be the only way to avoid an *accusation* that the items were destroyed or removed in order to obstruct an anticipated future investigation. Thus, in an ever-expanding universe of federal regulation, the Government's unbounded interpretation would—without exaggeration—

greatly contribute to the problem of overcriminalization. Fails, 68 N.Y.U. Ann. Surv. Am. L. at 421 (concluding that nexus and scienter requirements should be implied to the Arthur Andersen provision).

B. An Unbounded Interpretation of "Tangible Object" Invites Pretextual Prosecutions

The Justice Department has an unfortunate history of employing Section 1519, and other obstruction statutes, to advance pretextual and other secondary goals. Like other process crimes, Section 1519 is "readily amenable" to pretextual prosecutions because it is "easy to prove and hard to defend," and "carr[ies] significant penalties." *See* Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 Geo. L. J. 1435, 1443-1445, 1472, 1475 (2009). Indeed, the Arthur Andersen Provision offers a "veneer of legitimacy..." for a criminal prosecution advanced for secondary goals. And when employing an unbounded interpretation of "tangible objects," the Justice Department has even greater leverage.

Pretextual enforcement may be said to occur where there is a "primary basis" for targeting an individual and a "secondary basis" for bringing the prosecution. *See* Murphy, 97 Geo. L. J. 1435 at 1442. In *Arthur Andersen*, for example, the Justice Department charged the accounting firm with obstruction, while the underlying purpose of the suit was to "eliminate [Andersen] as a credible source of testimonial support for the defense of Enron or any

of its indicted officers." Silverglate, *supra*, at 133.[14] Similarly, in *United States v. Stevens*, 771 F Supp. 2d 556 (D. Md. 2011), the government indicted an in-house GlaxoSmithKline attorney under Section 1519 for allegedly obstructing a Food and Drug Administration investigation. The attorney was eventually acquitted after a dismissal and re-indictment.[15] But, commentators posit that the case was never really about obstruction of justice—in actuality the case was brought "as 'part of the governments long-promised crackdown on individual executives for their roles in pharmaceutical company cases' and because of the 'mounting complaints from consumer groups and Congress that companies are paying nine-figure fines as a cost of doing business while executives are almost never held accountable.'" Fails, 68 N.Y.U. Ann. Surv. Am. L. at 416.

The GlaxoSmithKline attorney in *Stevens* was eventually vindicated, as the trial court noted that he "should never have been prosecuted." *Id.* at 417.[16] But the case serves as an example of a troubling trend. And *Amicus* is concerned that—if the Court should expand the scope of Section 1519 to cover the entire universe of physical objects that may be relevant in a future investigation—prosecutors will

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[14] *See* Harry Litman, *Pretextual Prosecution*, 92 Geo. L. J. 1135, at 1152 (2004) (discussing "cooperation cases" where charges are brought "to induce the defendant to cooperate in the investigation or prosecution of another person").

[15] *See* Fails, *supra*, at 417 n.88-94.

[16] As in *Arthur Andersen*, Stevens's prosecution was "a ploy to encourage GlaxoSmithKline to settle with the FDA." *Id.* at 429.

have tremendous leeway to bring enforcement actions for ostensibly legitimate, but potentially inappropriate, reasons. This further contributes to the problem of overcriminalization.

C. The Mere Threat of Prosecution Under the Arthur Anderson Provision Can be Devastating for a Small Business

An obstruction indictment, by itself, has severe consequences. The *Russell* prosecution is said to have "bordered on terror,"[17] while *Arthur Andersen* was noteworthy for its "*in terrorem* effect." Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. Rev. 311, at 330 (2007). Faced with severe criminal penalties for his alleged violation of Section 1519, *Russell* was induced to plea to a crime for which he served six months' home confinement—a potentially "career-wrecking" result for a man who acted without any express knowledge that the government was actively investigating the choirmaster. Silverglate, *supra*, at 160, 163.

An obstruction indictment is enough to call into question the future—and certainly the reputation—of any company. By the time Arthur Andersen achieved its victory before this Court in 2005, it had no future and 28,000 of its employees had no jobs. *Id.* at 133. As one commentator explained:

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[17] Silverglate, *supra*, at 162.

> [T]o Andersen, the court's ruling doesn't matter, the original trial at which it was convicted didn't matter and the verdict at any coming trial won't matter. Andersen was destroyed when it was indicted. No exoneration at trial and no ruling by the Supreme Court will cause it to rise, Lazarus-like, from the dead.[18]

Of course if an obstruction indictment is enough to sink one of the Big Five accounting firms, it is unquestionably enough destroy smaller firms. One must remember that small businesses generally lack tremendous capital assets. For this reason they are more vulnerable when faced with a legal challenge—whether a frivolous lawsuit or a pretextual indictment. But unlike a civil lawsuit, which can just as well destroy a business, a federal indictment tarnishes the business's reputation with stigma of criminality.

III. Congress Could Not Have Intended to Require Businesses to Incur Costs for Retention of Products, Inventory and Other Non-Communicative Items

The Sarbanes-Oxley Act costs the nation's businesses a measurable percentage of the United States gross domestic product every year. Much of that cost includes the expense of implementing and maintaining compliant document retention and

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[18] Joseph A. Grundfest, Over Before It Started, N.Y. Times, A23 (June 14, 2005), *available* at http://www.nytimes.com/2005/06/14/opinion/14grundfest.html?_r=0 (last viewed 6/30/14).

destruction programs. And should this Court endorse the Government's unbounded interpretation of the Arthur Andersen Provision—treating any and all physical matter as equivalent to documents or records—the result will significantly increase, perhaps grossly multiply, compliance costs.

A. Sarbanes-Oxley Compliance Costs are Already Staggering When Understood Only as Requiring Document Retention Programs

The Sarbanes-Oxley Act sought to "clarify and close loopholes in the existing criminal laws relating to the destruction or fabrication of evidence and the preservation of financial and audit records." Stanley S. Arkin & Charles Sullivan, *Document Destruction Under Sarbanes-Oxley*, New York Law Journal, 1 (Sept. 15, 2003) (quoting 148 Cong. Rec. S7419 (July 26, 2000) (statement of Sen Leahy).[19] The Arthur Andersen Provision has thus been understood as making it a crime to destroy records, documents and other such files in anticipation of a potential future federal investigation. But, for the very reasons discussed above, this has resulted in "increased uncertainty, legal jeopardy, and grossly increased cost for the business community."[20] *Id.*, at 1.

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[19] *Available* online at http://www.arkin-law.com/wp-content/uploads/Document-Destruction-under-Sarbanes-Oxley.pdf (last visited 6/30/14).

[20] "In the absence of a thoughtful document retention and destruction policy, most businesses of any size will soon be overrun with the detritus of their own information." Arkin, *supra*, at 7.

One study put the five-year overall cost of Sarbanes-Oxley at $1.4 trillion.[21] Ivy Xiying Zhang, Economic Consequences of the Sarbanes-Oxley Act of 2002, 44 J. Acct. & Econ. 74 (2007). Document retention costs were only part of the overall compliance costs—but likely represented a significant percentage of the total figure. These costs are disproportionately burdensome for small businesses because they usually lack in-house compliance officers. *See* Oleg Rezzy, *Sarbanes-Oxley: Progressive Punishment for Regressive Victimization*, 44 Hous. L. Rev. 95, 117 (2007).

B. An Unbounded Interpretation of "Tangible Object" Would Radically Increase Retention Costs for Business

In light of the aggressive posture the Justice Department has taken in prosecuting anticipatory obstruction cases under the Arthur Andersen Provision, *Amicus* is concerned that an unbounded interpretation of "tangible object" will require businesses to consider retaining any physical matter relevant to a current or contemplated federal investigation of any kind. Every manufacturer, wholesaler, retailer, rancher, and farmer—whose wares, output, livestock, or grain is subject to federal inspection must consider warehousing any and all non-compliant products, along with the means of

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[21] Milton Friedman said that the Sarbanes-Oxley Act was the greatest problem facing the United States economy. Josh Gersten, *Friedman, 93, Set to Unleash Power of Choice*, New York Sun (Mar. 22, 2006), *available* online at http://www.nysun.com/national/friedman-93-set-to-unleash-power-of-choice/29551/ (last visited 6/30/14).

producing those items, or face possible felony prosecution. This will result in tremendous new costs, which may not be easily absorbed by smaller firms.

The point is well illustrated in consideration of *United States v. Alexander Wolff*, 08-CR-00417 (Aug. 31, 2010)(St. Eve, J.)("*Wolff Indictment*").[22] In that case federal prosecutors indicted employees of a food conglomerate company for allegedly conspiring to anticipatorily obstruct investigations by the Department of Commerce into "transship[ments]," of Chinese honey through other countries to avoid payment of heavy "antidumping" duties.[23] *Id.*, at ¶ 33. Specifically the Department of Justice alleged that the defendants manipulated or falsified records in anticipation of a prosecution—an act that is unambiguously prohibited by the Arthur Andersen Provision. But, under the Government's unbounded interpretation of the term "tangible objects" in the present case, it would follow that the company might also have faced criminal liability for mishandling the honey—which was itself physical evidence of a potential regulatory violation.

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22 *Available* at http://www.justice.gov/usao/iln/pr/chicago/2010/pr0901_01a.pdf (last visited 06/27/14).

23 Honey import duties vary substantially. In 2001, the Department of Commerce determined that Chinese-origin honey was being sold into the United States at artificially low prices, and imposed "antidumping" duties that have exceeded 220 percent. *Wolff Indictment*, *supra*, at par. 29. In contrast, honey imported from Russia, India, and South Korea faces no antidumping duties. *Id.*

In the *Wolff Indictment*, the company was accused of filtering Chinese-origin honey in order to remove evidence "that the honey originated in China." *Id.* at ¶ 50. Under the theory advanced here, the government might just as well have alleged that the honey was a "tangible object" that the defendants "knowingly" "alter[ed]"" from an unfiltered or unadulterated state with the intent to impede a Department of Commerce investigation. But, if filtered or adulterated honey—like an undersized fish—is a "tangible object" for the purposes of Section 1519, then the company might just as well have faced prosecution for anticipatory obstruction in taking other actions that might otherwise make the noncompliant product unavailable to the government (*e.g.*, selling the product or disposing of it). This could have profound implications for all levels of commerce.

Wolff suggests that any company importing products or commodities from abroad must set aside those shipments for an indefinite period if there is any concern that there may have been a violation of federal regulation or treaty. The implication is that food processing companies must warehouse their entire production of any product if there is a chance of an FDA investigation. For that matter, a business might face criminal prosecution for obstructing a potential Federal Trade Commission investigation if the company should dispose of a product after realizing that it may have errantly labeled the product as "Made in America." Or a farmer might face prosecution for getting rid of fertilizer that he suspects is no longer compliant with current regulations.

It is hard to imagine any enterprise dealing with "tangible objects" that would be immune from such concerns. Even remedial measures might expose businesses to prosecution under Section 1519. For example, a contractor might be prosecuted for anticipatory obstruction if he or she should remove gravel that was originally placed on a portion of land that might potentially be viewed as a wetland—as this may be said to obstruct anticipated investigations from the Environmental Protection Agency or the Army Corps of Engineers.[24] Likewise, a construction company might face criminal prosecution if it should replace non-compliant safety equipment because aggressive prosecutors might view this as potentially impeding the Occupational Safety and Health Administration from discovering the violation.

Because strict criminal liability may apply to "contemplated" investigations, as in *Russell*, it is possible that many businesses will choose to "over-retain." Especially when dealing with large quantities of a noncompliant product, the costs of retention will be staggering. That would be all the more true if Section 1519 is understood as imposing criminal liability on anyone disposing of any physical

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[24] Like the attorney in *Russell*, an individual in this situation would be caught in a catch-22. If the contractor leaves the gravel in place, he or she risks ruinous civil penalties for violating the Clean Water Act (CWA)—penalties that *accrue daily* at $37,500. *See Sackett v. E.P.A.*, 132 S. Ct. 1367, 1370 (2012). But if the contractor removes the gravel there is a possibility prosecutors might allege that he or she has removed "tangible objects" with intent to obstruct a future investigation into the potential CWA violation.

evidence that might be relevant in any future inspection.

C. Congress Should Not be Presumed to Have Imposed Such Heavy-Handed Burdens on Business

This Court's recent decision in *Utility Air Regulatory Group v. Environmental Protection Agency* emphasized a salient point: context matters when deciphering the meaning of a statutory provision. In *Utility Air Regulatory Group* the Court held that—despite the fact that the law may assume a general definition, or an "act-wide" definition in the case of the Clean Air Act—it may be appropriate to infer a more narrow definition in the context of a specific provision. 12-1146, 2014 WL 2807314 (U.S. June 23, 2014); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (referring to the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). This is all the more true where the more general definition would lead to absurd results, or where it would transform the provision so as to allow government to reach conduct that Congress did not seemingly intend. *Utility Air Regulatory Group*, 12-1146, 2014 WL 2807314. In the criminal context, this approach to statutory construction is consistent with rule of lenity, which holds that courts should construe criminal statutes narrowly on the assumption that Congress would speak more clearly if it intended to cast a broader net. *United States v. Santos*, 553 U.S. 507, 514

(2008); *see also United States v. Bass*, 404 U.S. 336, 347-349 (1971).

In this case it should not be assumed that Congress intended to impose burdensome retention requirements on business for the entire universe of physical things that might be viewed as relevant evidence in all future regulatory investigations. As this Court made clear in *Lawson*, Sarbanes-Oxley was enacted to address financial fraud. *Lawson*, 134 S. Ct. at 1161. It should not be converted into an open-ended prosecutorial tool to enforce the entire universe of federal regulation.

CONCLUSION

For the foregoing reasons, this Court should reverse the Eleventh Circuit and hold that Section 1519 of the Sarbanes-Oxley Act is limited by its contextual construction to require retention of only records, documents and similar files.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
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IN THE

Supreme Court of the United States

JOHN L. YATES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE HONORABLE MICHAEL OXLEY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

INTEREST OF THE *AMICUS* 1

INTRODUCTION 2

BACKGROUND 5

ARGUMENT 8

I. Congress Enacted Section 1519 To Close Loopholes in Existing Law Regarding the Alteration or Destruction of Business Records 8

II. The Government's Interpretation of Section 1519 Cannot Be Reconciled with Congress's Intentions 17

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 11

Arthur Andersen LLP v. United States, 544 U.S. 696 (2005) 2

Babbitt v. Sweet Home Chapter of Cmties. for a Greater Or., 515 U.S. 687 (1995) 13

FTC v. Mandel Bros., Inc., 359 U.S. 385 (1959) 11

Hibbs v. Winn, 542 U.S. 88 (2004) 20

INS v. Nat'l Ctr. for Immigrants' Rights, 502 U.S. 183 (1991) 11

MCI Telecommunications Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218 (1994) 19

Mead Corp. v. Tilley, 490 U.S. 714 (1989) 11

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) 13

Rodriguez v. United States, 480 U.S. 522 (1987) 20

Smith v. Goguen, 415 U.S. 566 (1974) 19

United States v. Buckley, 192 F.3d 708 (7th Cir. 1999) 23

Statutory Provisions

18 U.S.C. § 1512 ..... *passim*

18 U.S.C. § 1519 ..... *passim*

18 U.S.C. § 1520 7–10

Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (July 30, 2002) ..... *passim*

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Christopher R. Chase, *To Shred or Not to Shred: Document Retention Policies and Federal Obstruction of Justice Statutes*, 8 Fordham J. Corp. & Fin. L. 721 (2003) 10

148 Cong. Rec. H4845 (daily ed. July 17, 2002) 10

148 Cong. Rec. S6327 (daily ed. July 8, 2002) 6, 8

148 Cong. Rec. S6491 (daily ed. July 9, 2002) 7

148 Cong. Rec. S6537 (daily ed. July 10, 2002) 15

148 Cong. Rec. S6545 (daily ed. July 10, 2002) 15

148 Cong. Rec. S6550 (daily ed. July 10, 2002) 16, 21

148 Cong. Rec. S6758 (daily ed. July 15, 2002) 15

148 Cong. Rec. S6767 (daily ed. July 15, 2002) 15

H.R. 3763, The Corporate and Auditing Accountability, Responsibility, and Transparency Act, hearings before the House Committee on Financial Services, 107th Cong. (Mar. 13, 20, Apr. 9, 2002) 5

H.R. Rep. No. 107-414 (2002) 6

H.R. Rep. No. 107-610 (2002) (Comm. Rep.) 8

Richard A. Oppel, Jr. & Kurt Eichenwald, *Arthur Andersen Fires an Executive for Enron Orders*, N.Y. Times, Jan. 16, 2002 2

Chris William Sanchirico, *Evidence Tampering*, 53 Duke L.J. 1215 (2004) 23

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Daniel A. Shtob, *Corruption of a Term: The Problematic Nature of 18 U.S.C. § 1512(c), the New Federal Obstruction of Justice Provision*, 57 Vand. L. Rev. 1429 (2004) 23

2A N. Singer, Statutes and Statutory Construction § 46.06 (rev. 6th ed. 2000) 20

INTEREST OF THE *AMICUS*[1]

The Honorable Michael G. Oxley represented Ohio's Fourth Congressional District for 25 years and served as Chairman of the House Financial Services Committee from 2001 to 2007. In that role, he was co-author of the Sarbanes-Oxley Act of 2002 ("SOX") and led the broad, bipartisan coalition that enacted the statute. Representative Oxley and SOX's other supporters intended the statute to protect investors, to improve the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes, including "provid[ing] for criminal prosecution of persons who alter or destroy evidence in *certain* Federal investigations or defraud investors of publicly traded securities." S. Rep. No. 107-146, at 2 (2002) (Comm. Rep.) (emphasis added). Consistent with that purpose, Representative Oxley recognizes that overly broad interpretations of SOX's provisions threaten to undermine the Act's reforms by imposing undue burdens on businesses and individuals, upsetting the careful balance struck by Congress. The *amicus* therefore has an interest in vindicating the limitations inherent in SOX's anti-shredding

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[1] Pursuant to Rule 37.6, counsel for the *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amicus curiae* or his counsel made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of this brief are filed with the clerk.

provision against the Government's attempt to expand it to reach conduct far beyond anything that Congress ever anticipated or intended.

INTRODUCTION

On October 23, 2001, David B. Duncan, the lead Arthur Andersen partner on the firm's Enron account, convened a meeting in his office. The week before Enron had disclosed charges for bad investments exceeding $1 billion, and now the Securities and Exchange Commission was requesting information from the company. Worried about what the records in Andersen's possession might reveal, Duncan ordered his staff to destroy troves of paper files, hard drives, and emails relating to the account. For the next two-and-a-half weeks, Andersen employees in offices on both sides of the Atlantic worked overtime to carry out Duncan's instruction. It was not until the SEC formally subpoenaed Duncan on November 8 that his assistant sent an email to other secretaries at the firm telling them to "stop the shredding."[2]

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[2] *See generally Arthur Andersen LLP v. United States*, 544 U.S. 696, 699–702 (2005); S. Rep. No. 107-146, at 2–5 (2002) (Comm. Rep.); Michael Brick, *Andersen Fires Lead Enron Auditor*, N.Y. Times, Jan. 15, 2002, *available at* http://www.nytimes.com/2002/01/15/business/15CND-ENRON.html; Richard A. Oppel, Jr. & Kurt Eichenwald, *Arthur Andersen Fires an Executive for Enron Orders*, N.Y. Times, Jan. 16, 2002, *available at* http://www.nytimes.com/2002/01/16/business/16ENRO.html.

The next chapter in this story is by now well known. Within a month of Duncan's subpoena, Enron declared bankruptcy, over 20,000 employees found themselves unemployed and holding worthless retirement accounts, and investors and pension funds nationwide lost literally billions of dollars. What is more, revelations of the accounting fraud cast a long shadow over other companies' public filings and statements, and investors began to lose faith in the financial reporting of public corporations, imperiling public markets and the economy. Spurred by widespread calls for action, Congress turned its attention to the legal and regulatory regime that facilitated Enron's fraud. The result was the Sarbanes-Oxley Act of 2002.

The Act's obstruction of justice provisions, in particular, grew out of frustration with shortcomings in existing federal law that had hampered prosecutors in the wake of Enron's collapse. Because the law only made it a crime to "persuade[] another person" to destroy evidence, 18 U.S.C. § 1512(b)(2)(B), prosecutors charging Arthur Andersen were forced "to proceed under the legal fiction that the defendants are being prosecuted for telling other people to shred documents, not simply for destroying evidence themselves." S. Rep. No. 107-146, at 7 (2002) (Comm. Rep.). And even that theory was tenuous, because then-existing law did not necessarily forbid the destruction of documents in *contemplation* of a federal investigation, before one had been formally launched.

That context is crucial to understanding SOX's "document-shredding" provisions, including the one at issue in this case. Section 1519 in particular was enacted to close the two loopholes identified in the Arthur Andersen case. Modeled on existing law, it expanded the scope of liability to reach third parties like accountants who themselves destroy business records. It also adopted an earlier trigger for liability, the "contemplation" of a federal investigation. In these ways, Congress sought to ensure that the Arthur Andersen scenario could not recur. That intention—and the commensurate limitation of the scope of the provision to records—is confirmed by the statutory language and its derivation, the pairing of Section 1519 with a parallel provision addressing audit records in a single statutory section concerning the destruction of "records," and the legislative history, which repeatedly recognizes Section 1519 for what it is: an "anti-shredding provision."

Against this unanimous evidence of congressional intent, the Government's reading of Section 1519 to reach destruction of any and all things, including piscine creatures, falls flat. Beyond failing to account for context, the Government's interpretation also obliterates the fine distinction that Congress sought to draw between Section 1519 and another SOX provision, codified at 18 U.S.C. § 1512(c)(1), that establishes a broader prohibition on destruction or alteration of any kind of object, but is triggered in narrower circumstances more likely to put persons on notice of their obligations. If the Government's position

prevails, not only would that latter provision be rendered superfluous, but the careful balance that Congress struck between law-enforcement needs and providing clarity to citizens and regulated parties would be upended, imposing an open-ended compliance burden that would place even the law-abiding at risk of criminal prosecution.

The Court should vindicate Congress's intentions and the plain language of Section 1519, understood in its proper context, by holding that it applies to business records and "tangible object[s]" that store such records, like hard drives and CD-ROMs. Not fish.

BACKGROUND

What was to become the Sarbanes-Oxley Act of 2002 began in the House of Representatives. Representative Oxley and the House Financial Services Committee took the first step in overhauling reporting and auditing standards in the hope of restoring confidence in American markets. Even before the introduction of the language that would ultimately become Section 1519, Congress expressed deep concern regarding the destruction of critical documents by parties potentially, or already, under investigation for financial fraud. *See* H.R. 3763, The Corporate and Auditing Accountability, Responsibility, and Transparency Act, hearings before the House Committee on Financial Services, 107th Cong. (Mar. 13, 20, Apr. 9, 2002), at 95, 154, 460 (hearings on the emerging bill discussing recent corporate accounting and auditing scandals).

The Financial Services Committee reported the bill to the House of Representatives on April 22, 2002. *See* H.R. Rep. No. 107-414 (2002). After two days of deliberations, the House passed the bill on April 24. On July 8 the Senate proceeded to consider its own version, the Public Company Accounting Reform and Investor Protection Act, S. 2673, which was introduced by Senator Paul Sarbanes. That bill was reported out of the Senate Committee on Banking, Housing, and Urban Affairs on June 18. *See* 148 Cong. Rec. S6327–47 (daily ed. July 8, 2002).

The "anti-shredding" provision Section 1519 was not contained in the original House or Senate bills, but was first proposed in the Senate Judiciary Committee, which had been asked, months before, to craft legislation "to provide for criminal prosecution of persons who alter or destroy evidence in certain Federal investigations or defraud investors of publicly traded securities." *See* S. Rep. No. 107-146, at 1 (2002) (Comm. Rep.). That committee, under the leadership of Senator Patrick Leahy, responded with "The Corporate and Criminal Fraud Accountability Act of 2002," S. 2010, May 6, 107th Congress, 2d. Session, which was reported to the Senate on May 6. The relevant language was adopted into SOX verbatim: no person shall "knowingly alter[], destroy[], mutilate[], conceal[], cover[] up, falsif[y], or make[] a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or

agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case." *See* Sarbanes-Oxley Act, Pub. L. No. 107-204, 116 Stat. 745 (July 30, 2002). The only aspect of this provision altered throughout the legislative process was the penalty. *Compare* S. Rep. No. 107-146, at 36 (2002) (Comm. Rep.), *with* 18 U.S.C. § 1519.

The bulk of the Judiciary Committee's bill was offered as an amendment to Senator Sarbanes's S. 2673 on July 9. *See* 148 Cong. Rec. S6491–96 (daily ed. July 9, 2002). This amendment included Section 1519, which was paired with another provision, later codified as 18 U.S.C. § 1520. These two provisions—Sections 1519 and 1520—were both placed in SOX Section 802, entitled "Criminal Penalties for Altering Documents." Section 1519 carried the title "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy," and Section 1520 the title "Destruction of corporate audit records." *See* 148 Cong. Rec. S6491–96 (daily ed. July 9, 2002).

Notably, Senator Trent Lott also proposed a related amendment to 18 U.S.C. § 1512, the preexisting obstruction of justice provision that had proven inadequate in the Enron affair. Section 1512 had previously made it a crime to "knowingly use[] intimidation, threaten[], or corruptly persuade[] another person" to tamper with or destroy evidence. Senator Lott's Amendment 4188, accepted in Senate deliberation, removed the requirement that the prohibited

action be executed through another person. *See* 148 Cong. Rec. S6327–47 (daily ed. July 8, 2002).

On July 15, he Senate passed its version of Sarbanes-Oxley, including the new Section 1519, Section 1520, and the amended Section 1512, and a conference committee was convened on July 19 to iron out disagreements between the House and Senate versions. *See* Sarbanes-Oxley Act of 2002, H.R. Rep. No. 107-610 (2002) (Comm. Rep.). The committee settled on a version that included Section 1512(c), Section 1519, and Section 1520 from the Senate bill, and filed its report on July 24. *See id.* at 57, 64. The committee's compromise bill was passed by both houses the following day and signed into law by President George W. Bush on July 30, 2002.

ARGUMENT

I. Congress Enacted Section 1519 To Close Loopholes in Existing Law Regarding the Alteration or Destruction of Business Records

Contrary to the interpretive gloss the Government wishes to put on Section 1519, that provision is limited to destruction or alteration of records, commensurate with congressional purpose. Section 1519 was enacted in direct response to prosecutors' difficulties in targeting the destruction of evidence by Arthur Andersen and was meant to close the loopholes in the federal obstruction of justice offenses which that incident had brought to light. This purpose is reflected structurally by the provision's placement in

SOX, textually by the provision's specific language and drafting history, and historically by the unanimous view that Section 1519's scope encompasses document shredding and the like, not any conduct under the sun that may undermine a federal investigation.

A. Section 1519's placement in SOX is crucial to understanding its purpose and scope. It was not enacted as a standalone provision of the statute, but rather paired with Section 1520 in SOX Section 802, entitled "Criminal Penalties for Altering Documents." These sister provisions are closely intertwined. Section 1520 requires that corporate audit records be retained for five years, while Section 1519 prohibits the destruction of business records in contemplation of a federal investigation or proceeding. Together, they establish a comprehensive regulatory regime for preservation of corporate records: those most likely to be relevant in cases of corporate fraud (i.e., audit records) are retained for a set period of time, which may be extended and broadened to include additional records when an investigation is contemplated. In this way, Congress sought to ensure that prosecution of corporate fraud would not again be hindered by the wanton destruction of corporate records, as in the Enron case.

The legislative history reflects as much. As the Senate Report explains, "Section [802] of the bill would create two new felonies [Sections 1519 and 1520] to clarify and close loopholes in the existing criminal laws relating to the destruction or fabrica-

tion of evidence and the preservation of financial and audit records." S. Rep. No. 107-146, at 14 (2002) (Comm. Rep.); *see also* S. Rep. No. 107-146, Additional Views of Senators Hatch, Thurmond, Grassley, Kyl, DeWine, Sessions, Brownback, and McConnell, at 27 (2002) (Comm. Rep.) ("Section [802] creates two new Title 18 offenses: an obstruction statute specifically directed to the destruction of documents, 18 U.S.C. 1519, and a document retention provision that applies to auditors of publicly traded securities, 18 U.S.C. 1520."); 148 Cong. Rec. H4845 (daily ed. July 17, 2002) (statement of Rep. Cox) ("Section 802 of the Senate bill concerns criminal penalties for shredding documents . . . ."); Christopher R. Chase, *To Shred or Not to Shred: Document Retention Policies and Federal Obstruction of Justice Statutes*, 8 Fordham J. Corp. & Fin. L. 721, 723 (2003) (describing Sections 1519 and 1520 as "the two new obstruction laws that were drafted to combat document destruction itself").

It is therefore no accident or happenstance that Section 1519 was paired with Section 1520, and that placement elucidates the scope of the "tangible object[s]" within the scope of Section 1519. Reading the two provisions together makes clear that Congress's focus was the destruction of "records," a point reinforced by that word's usage in the title to SOX Section 802 and the titles of both Section 1519 and 1520. Ascribing a substantially broader meaning to the term "tangible object" in Section 1519 renders that provision's placement in SOX incomprehensible

and therefore must be rejected. *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (finding that the term "criminal penalties" in section heading indicated that a provision did not define a separate crime, but instead set out penalties for recidivists); *INS v. Nat'l Ctr. for Immigrants' Rights*, 502 U.S. 183, 189–90 (1991) (citing *Mead Corp. v. Tilley*, 490 U.S. 714, 723 (1989), and *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 388–89 (1959)) ("[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text.").

B. The statutory text—and, in particular, its derivation—also reflects this limitation. Section 1519 was modeled on 18 U.S.C. § 1512(b)(2)(B) and departs from that provision in specific ways intended to close the two loopholes in that provision that came to light in the Arthur Andersen prosecution.

Using Section 1512(b)(2)(B) as a starting point, Congress made five key modifications in drafting Section 1519. First, to expand the temporal scope of Section 1519 and criminalize the destruction of business records before an investigation begins, Congress created a new trigger for liability: the statute's obligation attaches when a person acts in "contemplation of" a federal investigation or proceeding. 18 U.S.C. § 1519. This new trigger, which replaced the original one tied to an actual investigation, ensured that future David Duncans could not hide behind the argument that no specific investigation or criminal proceedings had yet officially commenced, and thus they had no responsibility to preserve the

records. Under the new provision, shredding documents in anticipation of a future investigation would unambiguously constitute a violation.

Second, Congress broadened the new provision to include bankruptcy proceedings and investigations by agencies such as the SEC by substituting "official proceeding" with "any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11." 18 U.S.C. § 1519. As such, Section 1519 makes destroying business records to obstruct an agency investigation a crime, even if the investigation does not lead to official proceedings, and also expands the scope of proceedings and investigations to reach all those that might be implicated by corporate fraud. *See* S. Rep. No. 107-146, at 15 (2002) (Comm. Rep.) ("[Section 1519] is also meant to do away with the distinctions, which some courts have read into obstruction statutes, between court proceedings, investigations, regulatory or administrative proceedings (whether formal or not), and less formal government inquiries, regardless of their title.").

Third, signaling that Section 1519 applies only to the destruction of business records, Congress added the terms "covers up, falsifies, or makes a false entry in" to the list of verbs found in Section 1512(b)(2)(B). By appending these words to "alters, destroys, mutilates, or conceals," Congress broadened the scope of conduct covered by the provision while also expressing its understanding that Section 1519 applies to a narrower domain of possible objects. "[C]overs up,

falsifies, [and] makes a false entry in"—unlike "alters, destroys, mutilates, or conceals"—are all actions specifically pertaining to documentary evidence like business records, not any possible kind of item. As such, they restrict the class of objects covered by the provision's verbs, including the potentially more general verbs drawn from Section 1512. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general."); *Babbitt v. Sweet Home Chapter of Cmties. for a Greater Or.*, 515 U.S. 687, 720–21 (1995) (Scalia, J., dissenting).

Fourth, Congress excised the requirement, found in Section 1512(b)(2)(B), that to violate the provision one must intimidate, threaten, or persuade *another person* to destroy the records. Instead, the subject of Section 1519 is the person who actually shreds the documents. This change was made in direct response to the fact that federal prosecutors had to proceed against Arthur Andersen under the legal fiction that the crime committed was persuading others to shred documents. S. Rep. No. 107-146, at 15 (2002) (Comm. Rep.) ("Finally, this section [1519] could also be used to prosecute a person who actually destroys the records himself in addition to one who persuades another to do so, ending yet another technical distinction which burdens successful prosecution of wrongdoers.").

Finally, Congress substituted "tangible object" for "object" in order to emphasize that Section 1519 reaches any and all media on which records might be

stored, such as hard drives and backup tapes. As the Senate Report detailed, "[t]he systematic destruction of records [at Arthur Andersen] apparently extended beyond paper records" to computer hard drives containing electronic documents and emails. S. Rep. No. 107-146, at 4 (2002) (Comm. Rep.). Absent such a clarification in the statutory language, it might have been unclear whether "any record [or] document" encompassed tangible objects containing records, like hard drives and CD-ROMs.

In short, a comparison of Section 1519 with its predecessor, Section 1512(b)(2)(B), confirms that Congress did not seek to craft a general prohibition on the spoliation of evidence. Instead, it took care to address specific loopholes in Section 1512(b)(2)(B) that Arthur Andersen and its employees had exploited when they shredded business documents and destroyed hard drives in anticipation of federal law-enforcement action.

C. The legislative history further confirms that purpose as well as the limited scope of Section 1519.

To begin with, Congress's focus, quite specifically, was Arthur Andersen's exploitation of shortcomings in the then-existing law. As the Senate Report observed, "the current rules on audit record retention are so vague that Andersen's lawyers issued ambiguous advice encouraging such document destruction—advice that they linked to . . . current law." S. Rep. No. 107-146, at 4 (2002) (Comm. Rep.). Reflecting on federal law as it existed at the time of the Andersen incident, Senator Trent Lott identified the

same problem: "Obviously, you cannot [shred documents] if there is something pending or if there is a subpoena. But as was the case recently, they knew an investigation was underway and a subpoena was likely, and the shredding of documents went forward." 148 Cong. Rec. S6545 (daily ed. July 10, 2002) (statement of Sen. Lott). Thus it was important to enact a provision like Section 1519 that was not limited only "to situations where the obstruction of justice can be closely tied to a pending judicial proceeding." S. Rep. No. 107-146, at 14 (2002) (Comm. Rep.).

That Congress did not intend the expanded temporal scope of Section 1519—and the severe penalties that attach to its violation—to apply to all classes of evidence is confirmed by the repeated references to Section 1519 in the legislative history as the "anti-shredding provision." *See, e.g.*, S. Rep. No. 107-146, at 14 (2002) (Comm. Rep.) (referring to Section 1519 as "a new general anti shredding [sic] provision"); 148 Cong. Rec. S6758 (daily ed. July 15, 2002) (statement of Sen. Kohl) ("The amendment also would establish a new felony antishredding [sic] provision . . . ."); 148 Cong. Rec. S6767–68 (daily ed. July 15, 2002) (statement of Sen. Leahy) (Section 1519 "closes loopholes and toughens penalties for shredding documents as we learned had occurred at Arthur Andersen . . . . This bill is going to send wrongdoers to jail and save documents from the shredder . . . ."); 148 Cong. Rec. S6537 (daily ed. July 10, 2002) (statement of Sen. Durbin) ("Do you know what happened? As soon as Enron got in trouble,

they called some of their buddies at Arthur Andersen, and the next thing you know, the documents are being shredded, evidence is disappearing. This underlying amendment . . . addresses this specifically."). Indeed, one need look no further than the title of the section to see Congress's intent: "Destruction, alteration, or falsification of *records* in Federal investigations and bankruptcy." 18 U.S.C. § 1519 (emphasis added).

Finally, the legislative history is replete with statements that Section 1519 was specifically intended to reach persons who destroy documents themselves, and not only those who instruct others do so. *See, e.g.*, 148 Cong. Rec. S6550 (daily ed. July 10, 2002) (statement of Sen. Hatch) ("Certainly, one who acts with the intent to obstruct an investigation should be criminally liable even if he or she acts alone in destroying or altering documents."); S. Rep. No. 107-146, at 14 (2002) (Comm. Rep.) ("First, [the bill] creates a new general anti shredding [sic] provision, 18 U.S.C. Sec. 1519, with a 10-year maximum prison sentence. Currently, provisions governing the destruction or fabrication of evidence are a patchwork that have been interpreted, often very narrowly, by federal courts. For instance, certain current provisions make it a crime to persuade another person to destroy documents, but not a crime to actually destroy the same documents yourself.").

Review of the legislative history reveals that Congress intended Section 1519—SOX's signature "anti-

shredding provision"—to apply to the destruction of business records, not any and all kinds of evidence.

II. The Government's Interpretation of Section 1519 Cannot Be Reconciled with Congress's Intentions

The Government's interpretation and application of an anti-shredding provision to reach the destruction of fish runs into three insurmountable problems. First, it would obliterate the careful and deliberate distinction that Congress drew between Section 1519 and another of SOX's obstruction-of-justice provisions, Section 1512(c). Second, in so doing, it would also render Section 1512(c) entirely superfluous. And third, it expands Section 1519 into a comprehensive, superseding obstruction of justice provision—a role quite clearly never intended by those who crafted the statute.

A. By reading "tangible object" in Section 1519 to reach any and all manner of objects, the Government negates important limitations in that provision that distinguish it from Section 1512(c), the SOX provision that actually does reach all kinds of evidence but is only triggered by an "official proceeding."

Section 1512(c) is a more customary obstruction of justice provision, imposing criminal liability on a person who corruptly . . . alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding." 18 U.S.C. § 1512(c)(1). While its scope is

exceedingly broad—reaching any alteration of anything—its "official proceeding" requirement ensures that persons are likely to have notice of this broad obligation so that they can comply with it.

Application of Section 1519, by contrast, turns on application of a far looser temporal trigger that may not provide actual, clear notice to a person potentially subject to liability under it. As discussed above, no official proceeding is required; it is enough that an investigation or proceeding merely be "contemplat[ed]." But that broad temporal scope is balanced by the limited scope of prohibited conduct: wrongful manipulation of *records*. A person can thereby avoid any risk of liability simply by acting to preserve and maintain business records, something that businesses are accustomed to doing. That essential limitation prevents Section 1519 from becoming a trap for the unwary.

Thus, both provisions carefully balance the needs of law enforcement with concerns regarding procedural fairness, efficiency, and business risk. While Section 1519 combines an unusually broad and amorphous temporal scope with a clear and well-understood obligation, Section 1512(c) prohibits a broader range of conduct, but only in circumstances where a person subject to its obligation is likely to have notice of it.

The distinction between these two SOX provisions is precisely why the Government's attempt to read "tangible object" in Section 1519 to include all manner of evidence is so misguided. That approach seeks

to establish the one thing that Congress diligently avoided: a criminal prohibition on altering anything at all that applies at potentially any time at all, so long as any kind of federal investigation or proceeding may be contemplated. And Congress avoided that kind of provision for good reason. In addition to imposing undue compliance burdens, it would be "of such a standardless sweep [that it] allows policemen, prosecutors, and juries to pursue their personal predilections." *Smith v. Goguen*, 415 U.S. 566, 575 (1974). Such a statute would raise serious Due Process concerns. *Id.* But Congress avoided those problems entirely by limiting Section 1519 to a narrower, more precisely defined scope of conduct.

This particular legislative design should be respected. The Government's reading seizes upon Congress's particular goal of preventing destruction of a certain class of objects in Section 1519, and stretches it to cover all destruction of all objects. But the judiciary is "bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 n. 4 (1994). The Government overlooks the fact that "no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary

objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525 (1987).

In sum, the "tangible object[s]" of Section 1519 cannot be the same as the "object[s]" of Section 1512(c). The Government's attempt to blur the line between these two provisions should be rejected as inconsistent with congressional intent.

B. The Government's interpretation of Section 1519 should also be rejected because it renders Section 1512(c) entirely superfluous. As described above, Section 1519's temporal scope is already broader than Section 1512's. If Section 1519's "tangible object[s]" are, as the Government would have it, to include any conceivable physical evidence, then that provision would prohibit the same conduct—alteration or destruction of evidence—as Section 1512(c), but over a broader period of time. Section 1512(c) would thus cease to serve any purpose.

It is unlikely, to say the least, that Congress sought to render its handiwork superfluous at the same time that it was enacting it. Both provisions were established by SOX, and both came from the Senate and were adopted by the conference committee that reconciled the House and Senate bills. A more reasonable assumption is reflected in the canon of interpretation that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quoting 2A N. Singer, Statutes and Statutory Construction § 46.06, pp. 181–86 (rev. 6th ed. 2000)).

Here, that assumption would accurately reflect that Congress was aware of both provisions, had different purposes for them, and intended them to reach different conduct. *See, e.g.*, 148 Cong. Rec. S6550 (daily ed. July 10, 2002) (statement of Sen. Hatch) ("This amendment [to Section 1512] closes this loophole by broadening the scope of the Section 1512. Like the new document destruction provision contained in S. 2010 [Leahy's Section 1519 Amendment], this amendment would permit the government to prosecute an individual who acts alone in destroying evidence, even where the evidence is destroyed prior to the issuance of a grand jury subpoena.").

In sum, the Government's suggestion that Congress enacted a nullity can and should be rejected by according Section 1519 its proper scope.

C. Finally, the Government's reading of Section 1519 tends to convert what was intended as a scalpel into a hatchet. It would expand the provision so as to absorb nearly all other obstruction of justice charges. But there is no indication in the legislative record that Congress intended to create a new, general, and comprehensive obstruction of justice provision, to supersede all others. To the contrary, members of the Senate Judiciary Committee observed that "section 1519 overlaps with a number of existing obstruction of justice statutes," but they considered it necessary to "capture[] a small category of criminal acts which are not currently covered under existing laws—for example, acts of destruction com-

mitted by an individual acting alone and with the intent to obstruct a future criminal investigation." S. Rep. No. 107-46, Additional Views of Senators Hatch, Thurmond, Grassley, Kyl, DeWine, Sessions, Brownback, and McConnell, at 27 (2002) (Comm. Rep.). In no instance did any member or committee suggest that Section 1519 would overtake those other statutes.

In fact, some members of the Senate Judiciary Committee, which drafted the provision, expressed "concern that section 1519 . . . could be interpreted more broadly than we intend." *Id.* The closest any member of Congress came to suggesting as broad an application of the provision as pressed by the Government here was a passing statement in the Senate Report that Section 1519 was meant to "apply broadly to any acts to destroy or fabricate physical evidence so long as they are done with the intent to obstruct, impede or influence the investigation or proper administration of any matter, and such matter is within the jurisdiction of an agency of the United States . . . ." S. Rep. No. 107-146, at 14 (2002) (Comm. Rep.). But immediately before this passage, the Report states that Section 1519 was intended merely to "close loopholes," not create a new, all-encompassing provision. *Id.* And, yet, an all-encompassing statute is precisely what even a basic application of the Government's reading would make it.

Commentators and courts have long recognized that there is no general spoliation of evidence provi-

sion in Title 18 of the U.S. Code. Indeed, both before and after SOX's enactment, it was recognized that obstruction of justice provisions are a patchwork of different rules, containing overlapping provisions and myriad loopholes. *See United States v. Buckley*, 192 F.3d 708, 710 (7th Cir. 1999) (describing obstruction of justice as a "medley of crimes"); Jill C. Anderson, *Misreading Like a Lawyer: Cognitive Bias in Statutory Interpretation*, 127 Harv. L. Rev. 1521, 1544 (2014); Chris William Sanchirico, *Evidence Tampering*, 53 Duke L.J. 1215, 1252 (2004). This reflects Congress's choice to develop this area of the law organically, rather than to impose a one-size-fits-all standard that applies to all conduct that might be characterized as manipulating evidence in ways that hinder criminal investigation or prosecution.

While arguments nonetheless can be made that a broad, more comprehensive statute preventing destruction of any and all evidence would serve well the aims of federal criminal investigation and prosecution, Section 1519 is not that provision. The legislative record shows that Section 1519 was meant to serve a particular purpose, in the particular context of corporate financial fraud. *See, e.g.*, Daniel A. Shtob, *Corruption of a Term: The Problematic Nature of 18 U.S.C. § 1512(c), the New Federal Obstruction of Justice Provision,* 57 Vand. L. Rev. 1429, 1443–44 (2004) ("Sections 1516 through 1519 address obstructive acts in specific contexts, including federal audits, examinations of financial institutions,

inquiries into health care-related offenses, and bankruptcy investigations."). But there is no indication that, in enacting Section 1519, Congress sought to refashion the federal law of obstruction of justice in one fell swoop.

CONCLUSION

The Court should give Section 1519 the meaning that Congress intended and recognize that it is directed at the destruction of documents and records, not fish. The decision of the court below should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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Supreme Court of the United States

JOHN L. YATES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, FLORIDA KEYS COMMERCIAL FISHERMEN'S ASSOCIATION, SOUTHEASTERN FISHERIES ASSOCIATION, GARDEN STATE SEAFOOD ASSOCIATION, COMMERCIAL FISHERMEN OF SANTA BARBARA, CALIFORNIA ABALONE ASSOCIATION, AND CALIFORNIA SEA URCHIN COMMISSION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a commercial fisherman was deprived of fair notice that destruction of fish would fall within the purview of 18 U.S.C. § 1519, which makes it a crime for anyone who "knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object" with the intent to impede or obstruct an investigation, where the term "tangible object" is ambiguous and undefined in the statute, and unlike the nouns accompanying "tangible object" in section 1519, possesses no record-keeping, documentary, or informational content or purpose.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. THE ELEVENTH CIRCUIT ERRED WHEN IT CONCLUDED THAT "TANGIBLE OBJECTS" IN SECTION 1519 APPLIED TO FISH 7

A. Under the *Ejusdem Generis* Rule of Statutory Interpretation, Fish Are Not Objects Within the Meaning of Section 1519 8

B. The Surplusage Rule of Statutory Interpretation Supports Yates's Interpretation of Section 1519 10

C. The Rule of *Noscitur a Sociis* Counsels That Fish Are Not Objects Within the Meaning of Section 1519 11

D. Courts Hold in Favor of Defendants Where a Reasonable Doubt Exists as to the Meaning of a Purportedly Applicable Statute 12

TABLE OF CONTENTS—Continued

Page

II. THE FEDERAL GOVERNMENT MISINTERPRETED THE LAW SO AS TO UNCONSTITUTIONALLY EXACT A PLEA BARGAIN 14

CONCLUSION 18

TABLE OF AUTHORITIES

Page

Cases

Bordenkircher v. Hayes, 434 U.S. 357 (1978) 17

Circuit City Stores, Inc. v. Adams,
532 U.S. 105 (2001) 8-9

Hanousek v. United States,
528 U.S. 1102 (2000) 2

In re Winship, 397 U.S. 358 (1970) 17

Irby v. United States,
390 F.2d 432 (D.C. Cir. 1967) 17

Kungys v. United States, 485 U.S. 759 (1988) 10

Lowe v. SEC, 472 U.S. 181 (1985) 11

McBoyle v. United States, 283 U.S. 25 (1931) 9

Missouri v. Frye, 132 S. Ct. 1399 (2012) 16

Moskal v. United States, 498 U.S. 103 (1990) 13

Munson v. McClaughry,
198 F. 72 (8th Cir. 1912) 18

Reiter v. Sonotone Corp., 442 U.S. 330 (1979) 11

Rickman v. Carstairs, 5 B. & Ad.
651, 110 Eng. Rep. 931 (1833) 5

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472 U.S. 1 (1985) 11-12

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561 U.S. 358 (2010) 1, 13

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TABLE OF AUTHORITIES—Continued

Page

United States v. Smyth,
213 Fed. App'x 102 (3d Cir. 2007) 11

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488 F.3d 752 (7th Cir. 2007) 11

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733 F.3d 1059 (11th Cir. 2013) 4-5, 7, 14

Unser v. United States, 528 U.S. 809 (1999) 2

Statutes

9 U.S.C. § 1 9

18 U.S.C. § 408 (1919) 9

§ 1001(a)(2) 4, 15

§ 1519 (2002) 4, 7

§ 2232(a) 4, 15

Regulations

50 C.F.R. § 622.2 4

§ 622.37(d)(2)(ii) (2007) 4

Rules

Sup. Ct. R. 37.3 1

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TABLE OF AUTHORITIES—Continued

Page

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TABLE OF AUTHORITIES—Continued

Page

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INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation (PLF), Florida Keys Commercial Fishermen's Association (Florida Keys), the Southeastern Fisheries Association (Southeastern), the Garden State Seafood Association (Garden State), the Commercial Fishermen of Santa Barbara (Santa Barbara), the California Abalone Association (California Abalone), and the California Sea Urchin Commission (California Sea Urchin) respectfully submit this brief amicus curiae in support of Petitioner John L. Yates (Yates).[1]

PLF was founded in 1973 and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind, and has participated in numerous cases before this Court both as counsel for parties and as amicus curiae. PLF attorneys litigate matters affecting the public interest at all levels of state and federal courts and represent the views of thousands of supporters nationwide who believe in limited government. PLF attorneys have participated in numerous criminal cases in this Court, including *Skilling v. United States*, 561 U.S. 358 (2010),

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

Hanousek v. United States, 528 U.S. 1102 (2000), and *Unser v. United States*, 528 U.S. 809 (1999). Because of its history and experience on these issues, PLF believes that its perspective will aid this Court in considering the issue on appeal.

Florida Keys represents the interests of the commercial fishermen working the largest commercial seaport in Florida. Florida Keys strives to manage the health of fisheries, the environment, and the fishing industry in south Florida. It also works with law enforcement to protect permit holders from poaching and other forms of thievery. Florida Keys has a long-standing interest in ensuring that commercial fishermen follow the many regulations that come from the state and federal regulators and is concerned about the application of the Sarbanes-Oxley Act in the instant case.

Southeastern is a nonprofit fisheries trade association founded by a core group of fish dealers and fishermen in 1952. Based in Tallahassee, Florida, Southeastern is comprised of companies, individual fishermen, and workers employed within or supportive of the seafood and aquaculture industry. Southeastern defends, protects, and enhances the commercial fishing industry in the southeastern United States for present participants as well as future generations while maintaining healthy and sustainable stocks of fish. Because of its long tradition of problem solving, commitment to America's natural resources, and support for the rule of law, Southeastern believes its views will aid this Court as it considers the problem of criminal overcharging and the case of John Yates.

Garden State is a trade association for the commercial fishing industry of New Jersey. Founded

in 1999, Garden State members include fishing vessel owners and operators throughout the state, from Belford to Cape May. Garden State works with local, state, and federal government, researches, and advocates on behalf of its 200 members and their $100 million of dockside landings and four-fold economic impact. Garden State members are interested in ensuring that the interests of its members are represented at the Court in this case and for this reason are participating as amicus on this brief.

Santa Barbara is a non-profit corporation comprised of commercial fishermen and organized to integrate regional efforts of fishing communities with the aim of improving the economic and biological sustainability of fisheries. The organization aims to maintain California's fishing heritage, to improve fisheries management where needed, and to contribute to the improvement of ocean health. The organization is concerned about grafting federal criminal law onto the civil state and federal regulatory structure already applicable to commercial fishermen, and thus is interested in this case and believes its views will assist the Court in considering this case.

California Abalone is a non-profit corporation formed in 1971 with a mission to restore and steward a market abalone fishery that utilizes modem management concepts, protect and enhance the resource, and guarantee a sustainable resource for the future. California Abalone members fear the expansion of federal white-collar criminal law to the practice of fishing.

California Sea Urchin was created in 2004 by divers and handlers to ensure a sustainable sea urchin

resource and a reliable supply of quality seafood product for domestic consumption and export. The Commission seeks to support strong local coastal communities, fair levels of income for fishermen engaged in sea urchin commercial fishing, and historically significant cultural and community resources within California's coastal areas.

INTRODUCTION AND SUMMARY OF ARGUMENT

John L. Yates purportedly caught 72 red grouper that the Magnuson-Stevenson Act and related regulations deem undersized.[2] He received a civil fishing citation for violating the Act. *See United States v. Yates*, 733 F.3d 1059, 1061 (11th Cir. 2013). Three years later, the government turned this fish story into a federal prosecution, charging Yates with destruction of evidence,[3] making a false statement,[4] and, most relevant here, destroying, concealing, or covering up "undersized fish" so as to impede a government investigation into his catching undersized red grouper.[5] *Id.* This last alleged crime, a purported violation of the anti-shredding provision of the Sarbanes-Oxley Act (SOX Act) at 18 U.S.C. § 1519 (2002) (Section 1519), sought to punish Yates for throwing fish overboard *after* the government deemed him to have violated the Magnuson-Stevenson Act.

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[2] 50 C.F.R. §§ 622.2, 622.37(d)(2)(ii) (2007).

[3] 18 U.S.C. § 2232(a).

[4] 18 U.S.C. § 1001(a)(2).

[5] 18 U.S.C. § 1519.

Sound principles of statutory construction refute the government's overly expansive interpretation of Section 1519. That is not to say that this Court should look for "legislative intent" so as to deem this application of Section 1519 improper. *See Yates*, 733 F.3d at 1064 (noting that the court did not need to resort to legislative intent or history to reach its decision). Rather, as Justice Oliver Wendell Holmes once said: "We do not inquire what the legislature meant; we ask only what the statute means." *See* Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419 (1899); *see also Rickman v. Carstairs*, 5 B. & Ad. 651, 663, 110 Eng. Rep. 931, 935 (1833) ("The question in this and other cases of construction of written instruments is, not what was the intention of the parties, but what is the meaning of the words they have used."); R.W.M. Dias, *Jurisprudence* 237 (4th ed. 1976) ("[T]he amorphous composition of the legislative body compels a tribunal to address itself to what the enactment means, not what particular persons may have meant.").

The Eleventh Circuit erred when it determined that the "ordinary meaning" rule of statutory interpretation means that a "fish" is a "tangible object" as that term is used in Section 1519. Although a fish is a tangible object and thus the ordinary meaning canon may point to the Eleventh Circuit's outcome, "various canons of interpretation point to different outcomes, requiring sound judgment as to which have the strongest force." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 159 (2012) (Scalia/Garner). Here, the Eleventh Circuit failed to consider any other canons of interpretation, several of which would have led to

an interpretation of "tangible object" that does not include "fish." Several canons merited a mention: the principles of *ejusdem generis*, surplusage, associated words, and ultimately the rule of lenity. When the scales of interpretation put those principles on one side and the ordinary meaning principle on the other, the scales tip heavily in favor of Yates. Ordinary meaning of the word "object" cannot apply here, despite the Eleventh Circuit's understandable desire to punish what it perceives as wrongdoing. *See* Scalia/Garner, *supra*, at 301. The jury decided that Yates threw fish overboard (or instructed his boatswain to do so), and the instinct to punish is a strong one. *Id.* But a fair system of laws requires precision in the definition of offenses and punishments. The less the courts insist on precision, the less the legislatures will take the trouble to provide it. *Id.*

The government overreached when it applied Section 1519 to Yates's conduct, and it did so in order to ratchet up the pressure on Yates for purposes of plea bargaining rather than because Section 1519 described his acts. The government charged Yates with violating Section 1519 because adding this charge increased the potential prison penalty he faced from ten years to thirty years. The government expected Yates to plead guilty to some of the alleged wrongdoing with an agreed-upon sentence, so as to reduce the risk of spending time in prison on a crime that did not apply to his facts. In this case, the Court should set out the proper way to interpret a criminal statute to constrain the government's apparently unlimited power to charge Americans for purposes other than getting a conviction. The government exceeds constitutional boundaries when it intimidates those facing criminal charges into waiving their Sixth Amendment right to

jury trial by charging them with crimes that either do not apply to the acts of the defendant or only apply when the law is stretched beyond or nearly beyond reasonable application.

ARGUMENT

I

THE ELEVENTH CIRCUIT ERRED WHEN IT CONCLUDED THAT "TANGIBLE OBJECTS" IN SECTION 1519 APPLIED TO FISH

The Eleventh Circuit determined that a portion of the SOX Act applied to the act of throwing fish overboard:

> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

18 U.S.C. § 1519.

In reaching its conclusion, the Eleventh Circuit briefly explained that the text was unambiguous and that the plain meaning of "tangible object" was broad enough to encompass fish. *Yates*, 733 F.3d at 1064. The Eleventh Circuit should have cast its net wider in determining the principles of statutory construction

that applied. Had it done so, it would have reached the correct conclusion: that Yates did not violate Section 1519 because that law did not apply to his acts.

A. Under the *Ejusdem Generis* Rule of Statutory Interpretation, Fish Are Not Objects Within the Meaning of Section 1519

The *ejusdem generis* canon applies when a law includes a catchall phrase at the end of a list of specifics. James A. Holland & Julian S. Webb, *Learning Legal Rules* 202 (3d ed. 1996) ("The *ejusdem generis* rule only comes into effect when dealing with general words at the end of a list."). If a law includes a list of specific items followed by a general catchall word, then "the principle of *ejusdem generis* essentially says that: It implies the addition of *similar* after the word *other*." Scalia/Garner, *supra*, at 199; *see also* Steward Rapalje & Robert L. Lawrence, *A Dictionary of American and English Law* 435 (1888) ("*[E]jusdem generis* "is a rule of legal construction that general words following an enumeration of particulars are to have their generality limited by reference to the preceding particular enumeration."); William D. Popkin, *A Dictionary of Statutory Interpretation* 74 (2007) ("[T]he *ejusdem generis* canon asserts that a general phrase at the end of a list is limited to the same type of things (the generic category) that are found in the specific list.").

Courts have applied this rule to "all sorts of syntactic constructions that have particularized lists followed by a broad, generic phrase." Scalia/Garner, *supra*, at 200. For example, this Court concluded that a list that set out " 'seamen, railroad employees, or other class of workers engaged in foreign or interstate

commerce'" only included transportation workers engaged in foreign or interstate commerce. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109, 115 (2001) (quoting 9 U.S.C. § 1). Likewise, in another case addressing this rule, the Court held that "'automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails'" did not include an airplane. *See McBoyle v. United States*, 283 U.S. 25, 26-27 (1931) (quoting 18 U.S.C. § 408 (1919)). In both of those cases, this Court limited the general phrase at the end to only refer to the same types of things in the specific list that came before the general phrase.

Courts rely on this canon of interpretation for two reasons: one, when the initial terms all belong to an obvious and readily identifiable genus, one presumes that the law has that category in mind for the entire passage. Scalia/Garner, *supra*, at 199. Second, when the general term is given its broadest application, it makes the prior enumeration of specific items unnecessary. Courts should "[c]onsider the listed elements, as well as the broad term at the end, and ask what category would come into the reasonable person's mind." *Id.* at 208.

This canon fits this case better than any other canon, including the plain meaning canon. A record and document call to mind tangible ways in which information is recorded, and are of a genus that does not include "fish," because "fish" are not used to record information. A ship's log that records data about the catch would, by contrast, be a record or document subject to the act.

Moreover, if "tangible object" had the broad meaning that the Eleventh Circuit ascribed to it, then

the law would not have needed to list "record" and "document" separately. "Tangible object" swallows "record" and "document" within its overbroad maw. Therefore, the Eleventh Circuit's reliance upon "plain meaning" to determine that a fish was an object fails to properly apply the canons of interpretation because the context here shows that the ordinary meaning of a word is not the proper meaning within the statute or legal document subject to interpretation. Scalia/Garner, *supra*, at 70. Here, in the context of Section 1519, and further in the context of a list of items that are specific, inserting "fish" where the word "object" appears leads to a result contrary to the meaning of the rest of the text as a whole.

B. The Surplusage Rule of Statutory Interpretation Supports Yates's Interpretation of Section 1519

The surplusage canon holds "that no provision [of a statute or document] should be construed to be entirely redundant." *Kungys v. United States*, 485 U.S. 759, 775, 778 (1988). Put another way, the canon provides that courts "must . . . lean in favor of a [statutory] construction that will render every word operative, rather than one which may make some idle and nugatory." Thomas McIntyre Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 58 (1868). The way to give "records," "documents," and "tangible objects" meaning is to interpret "tangible objects" to mean objects similar to records and documents, yet objects that do not include "documents" and "records" as synonyms.

An "object" within the meaning of Section 1519 may be a computer or portable media storage device,

both of which are not documents or records *per se* but can be used to store documents or records. *See United States v. Wortman*, 488 F.3d 752, 755 (7th Cir. 2007) (affirming Section 1519 conviction where defendant destroyed CD containing evidence related to federal investigation of child porn); *United States v. Smyth*, 213 Fed. App'x 102, 104 (3d Cir. 2007) (noting Section 1519 conviction for destroying computer hard drive so as to obstruct federal investigation). Here, however, a "fish" is not related to "documents" or "records." Interpreting "objects" to refer to a nonassociated word like "fish" is a violation of the surplusage canon. *See, e.g., Lowe v. SEC*, 472 U.S. 181, 207 n.53 (1985) ("[W]e must give effect to every word that Congress used in the statute."); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used.").

C. The Rule of *Noscitur a Sociis* Counsels That Fish Are Not Objects Within the Meaning of Section 1519

The associated words canon, also known as *noscitur a sociis*, provides that when words are associated in a context suggesting that the words have something in common, they should be interpreted as qualitatively similar, with related meanings. *See Third Nat'l Bank in Nashville v. Impac Ltd.*, 432 U.S. 312, 322 (1977) (stating the doctrine). Here, the grouping of records, documents, and tangible objects should be interpreted to denote similar meaning. A fish is not similar to records and documents.

In *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 7-8 (1985), this Court explained this doctrine:

> it is a "'familiar principle of statutory construction that words grouped in a list should be given related meaning.'" All three species of misconduct, *i.e.*, "fraudulent, deceptive, or manipulative," listed by Congress are directed at failures to disclose. The use of the term "manipulative" provides emphasis and guidance to those who must determine which types of acts are reached by the statute; it does not suggest a deviation from the section's facial and primary concern with disclosure or congressional concern with disclosure which is the core of the Act.

Id. (citation omitted).

Here, as in *Burlington Northern*, the use of the words "documents" and "records" limits the reach of Section 1519 when it uses the word "objects." "Objects" cannot include "fish,"because if that was the case then the three words "documents," "records," and "objects" would have nothing in common despite being *associated* in a list together.

D. Courts Hold in Favor of Defendants Where a Reasonable Doubt Exists as to the Meaning of a Purportedly Applicable Statute

Because this is a criminal case, the Court has yet a fourth canon of statutory interpretation to weigh against the Eleventh Circuit's plain meaning of the words canon—the rule of lenity. Chief Justice John Marshall explained the rule of lenity early in this nation's history:

> The rule that penal laws are to be construed strictly . . . is founded on the tenderness of

> the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.

United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820). Courts apply the rule when, after all the tools of interpretation have been applied, "a reasonable doubt [as to statutory interpretation] persists." *Moskal v. United States*, 498 U.S. 103, 108 (1990).

Here, many rules of statutory interpretation weigh in favor of reading Section 1519 so as not to substitute "fish" for "object." Under the rule of lenity, Yates must merely show that there is a "reasonable doubt" about whether "object" can mean "fish" within the meaning of Section 1519. *Moskal*, 493 U.S. at 108. Because many rules of interpretation favor Yates's interpretation of Section 1519, this Court should conclude, at a minimum, that a reasonable doubt exists as to the statute's meaning and that, as such, the Court must order Yates's conviction vacated. *See Skilling*, 561 U.S. at 410-11 ("'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity'") (citation omitted). In doing so, the Court should consider *why* the government intentionally expanded the meaning of Section 1519 so as to apply to a commercial fisherman with no connection to the accounting practices at issue that led to the passage of Section 1519 and the rest of the SOX Act.

II

THE FEDERAL GOVERNMENT MISINTERPRETED THE LAW SO AS TO UNCONSTITUTIONALLY EXACT A PLEA BARGAIN

In light of the proliferation of federal criminal statutes and regulations, the nation has reached a point where virtually every citizen is potentially at risk for prosecution. Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything Is a Crime*, 113 Colum. L. Rev. Sidebar 102, 104 (2013). Instead of the government investigating *crimes* to determine who committed them, the system allows for the government to target a *person* and then find the crime with which to charge him. *Id.*

That is what occurred here. In 2007, Yates found his ship boarded by a state fish and wildlife official ostensibly to do a safety check. *Yates*, 733 F.3d at 1061. The official cited Yates for violating a fishing regulation because he had 72 fish on board that were close but just short of the minimum-sized fish that he could catch in the area of the Gulf of Mexico where he was fishing. *Id.* But that civil violation turned into multiple federal criminal charges three years later when the federal government decided that this commercial fisherman was a criminal worthy of facing more than twenty years in prison because he may have thrown some undersized fish overboard. *Id.* at 1061-63. The ability of the government to charge a defendant with crimes of the government's choosing, crimes that by their own terms bear little relation to the purported wrongdoing of the defendant in any particular case, allows the government to "stack charges against defendants to coerce pleas." Paul J.

Larkin, Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause*, 37 Harv. J.L. & Pub. Pol'y 1065, 1067 (2014). Put another way:

> Once charged with a crime, defendants are in a tough position . . . even if they consider themselves entirely innocent, they will face strong pressure to accept a plea bargain—pressure made worse by the modern tendency of prosecutors to overcharge with extensive "kitchen-sink" indictments: Prosecutors count on the fact that when fac[ing] a hundred felony charges, the prospect that a jury might go along with even one of them will be enough to make a plea deal look attractive.

Reynolds, *supra*, at 105. In this case, if the government had evidence to charge Yates with destruction of evidence and making a false statement, the penalties for those crimes equaled, at most, ten years. *See* 18 U.S.C. § 2232(a), 18 U.S.C. § 1001(a)(2). Deciding that penalty was not intimidating enough; the government intentionally mis-applied Section 1519—with its 20 year prison sentence—so as to heighten the pressure Yates felt to plea bargain. By wrongly charging Yates with a crime that did not apply, the government dealt itself a bargaining chip that had no place at the table.

The government's well-known efforts to stack crimes at the outset of criminal litigation in order to bargain from a position of strength is known as "overcharging." *See* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 Stan. L. Rev. 29, 34 (2002). The nature of the plea bargain process prompts prosecutors to practice overcharging to

intimidate defendants with the implications of prison sentences that could run for years. *See* Laurie L. Levenson, *Peeking Behind the Plea Bargaining Process: Missouri v. Frye & Lafler v. Cooper*, 46 Loy. L.A. L. Rev. 457, 470 (2013). Moreover, the U.S. Sentencing Guidelines add to the government's ability to pressure defendants into pleading guilty by overcharging and challenging the defendant to go to trial and risk being found guilty (which can happen even when the defendant is not guilty, *see Missouri v. Frye*, 132 S. Ct. 1399, 1412 (2012) (Scalia, J., dissenting) (noting that "a unanimous jury finding beyond a reasonable doubt can sometimes be wrong")). The sentencing disparity between a pre-trial plea-bargained sentence, versus a post-trial court sentence, is stark.[6] *See* Andrew E. Taslitz, *Prosecutorial Preconditions to Plea Negotiations: "Voluntary" Waivers of Constitutional Rights*, 23 Crim. Just. 14, 20 (2008).

Because most criminal convictions are secured through plea negotiations, the government has an incentive to file more serious charges than those supported by the evidence with the "'hope that a defendant will be risk averse.'" *See* H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 Cath. U. L. Rev. 63, 84 (2011) (quoting Wright & Miller, 55 Stan. L. Rev. at 85). Moreover, the government will often file "all possible charges in an indictment, including those with very little support," so as to help secure a plea down the road. *Id.* (quoting Wright & Miller, 55 Stan. L. Rev. at 107).

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[6] This disparity is colloquially called a "trial tax." *See* Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 Yale L.J. 2650, 2668 (2013).

More than fifty years ago, this Court emphasized that "[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." *In re Winship*, 397 U.S. 358, 364 (1970) (referring to reasonable doubt standard). The moral force of criminal law is likewise diluted when the pressure of taking a case to trial leads those not even arguably culpable of all the crimes with which they are charged with pleading guilty so as to avoid the risk of spending a large portion of their lives in prison.

It is not unconstitutional for the government to increase the charges against a defendant "on which he [is] *plainly* subject to prosecution" if the defendant refuses to plea to lesser charges. *See Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978) (emphasis added). But that is not the type of overcharging complained of here. In this case, the government charged Yates with violating a statute on which he was *not* plainly subject to prosecution. That is what makes Yates's case undoubtedly violative of the "constitutional limits upon [the Government's] exercise [of its prosecutorial discretion]," as the majority said in *Bordenkircher*. *Id.* Even if this Court rejects the arguments above and concludes that Section 1519 is broad enough to apply to Yates, then the point remains that the Supreme Court had to accept the case to determine whether the statute applied to him. That alone requires a conclusion that the statute does not *plainly* apply to him, as in *Bordenkircher*.

"[O]ften it takes nothing more than a fertile imagination to spin several crimes out of a single transaction." *Irby v. United States*, 390 F.2d 432, 439 (D.C. Cir. 1967) (Bazelon, C.J., dissenting) (citing

Munson v. McClaughry, 198 F. 72, 74 (8th Cir. 1912). Here, the fertile imagination of the government spun out a case of a commercial fisherman shredding "objects" while at sea as if he was a Wall Street accountant with a paper shredder for a boatswain. This Court should reject the government's imaginative interpretation of the law and hold that Yates did not violate Section 1519 by his conduct in the instant case.

CONCLUSION

The judgment of the lower court should be reversed.

DATED: July, 2014.

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

JOHN L. YATES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a defendant is deprived of fair notice that the alleged destruction of harvested fish falls within the purview of 18 U.S.C. § 1519, a provision of the Sarbanes-Oxley Act of 2002 prohibiting the knowing destruction of "any record, document, or tangible object" with the intent to impede or obstruct an investigation.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTERESTS OF THE *AMICUS CURIAE* 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 5

ARGUMENT 8

I. Section 1519 Failed to Give Mr. Yates "Fair Warning" That His Alleged Conduct Was Prohibited 8

II. As Interpreted by the Eleventh Circuit, Section 1519 is Subject to Arbitrary and Discriminatory Enforcement 11

III. The Appeals Court's Unexpected and Novel Construction of Section 1519 Operates With Impermissible *Ex Post Facto* Effect 15

CONCLUSION 18

TABLE OF AUTHORITIES

Page(s)

CASES:

Anderson v. Creighton,
483 U.S. 635 (1987) 17, 18

Arthur Andersen LLP v. United States,
544 U.S. 696 (2005) 1

Bouie v. City of Columbia,
378 U.S. 347 (1964) 16

Connally v. General Constr. Co.,
269 U.S. 385 (1926) 8, 9

Friedman v. Sebelius,
686 F. 3d 813 (D.C. Cir. 2012)) 1

Grayned v. City of Rockford,
408 U.S. 104 (1972) 12, 14

Kolender v. Lawson,
461 U.S. 352 (1983) 9, 12, 14

Lanzetta v. New Jersey,
306 U.S. 451 (1939) 8

McBoyle v. United States,
283 U.S. 25 (1931) 8, 10, 11

Rivers v. Roadway Express, Inc.,
511 U.S. 298 (1994) 16

Rogers v. Tennessee,
532 U.S. 451 (2001) 15

Page(s)

Sabetti v. DiPaolo,
16 F.3d 16 (1st Cir. 1994) 11

Smith v. Goguen,
415 U.S. 566 (1974) 9, 12, 14, 15

Stolt-Nielsen S.A. v. United States,
549 U.S. 1015 (2006) 1

United States v. Harriss,
347 U.S. 612 (1954) 8

United States v. Lanier,
520 U.S. 259 (1997) 15, 16, 17

United States v. L. Cohen Grocery Co.,
255 U.S. 81 (1921) 11

United States v. Mazurie,
419 U.S. 544 (1975) 9

United States v. Reese,
92 U.S. 214 (1876) 13

United States v. Sullivan,
578 F.2d 121 (5th Cir. 1978) 17

STATUTES:

18 U.S.C. §1519 ..... *passim*

LEGISLATIVE MATERIALS:

148 Cong. Rec. at S7419 (July 26, 2002) 10

Page(s)

Sarbanes-Oxley Act of 2002 (H.R. 2673), Pub. L. No. 107-204, 116 Stat. 745 (2002) 10

OTHER AUTHORITIES:

Black's Law Dictionary (9th ed. 2009) 5, 10, 17

J. Brady Dugan & Mark J. Botti, *Honest Services Fraud and Antitrust: Will the Supreme Court Re-Write the Rules for "Competition Crimes"?*, WLF LEGAL BACKGROUNDER (Dec. 11, 2009) 3

Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 Law & Contemp. Probs. 401 (1958)..... 12

Sarah Hody & Martin Kwedar, *Stock-Option Backdating Cases Reflect Costs of Over-criminalization*, WLF LEGAL BACKGROUNDER (July 23, 2010)..... 1, 2

Robert H. Jackson, *The Federal Prosecutor*, 31 Am. Inst. of Crim. L. & Criminology 3 (1941) 13

Montesquieu, *The Spirit of the Laws* (J.V Pritchard ed., Thomas Nugent trans., 1914) (1748)..... 12, 13

Trevor W. Morrison, *Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes*, 745 Cal. L.R. 455 (2001)..... 16, 17

Page(s)

Wash. Legal Found.,
Special Report: Federal Erosion of Business Civil Liberties (2nd. ed., 2010)..... 1

INTERESTS OF *AMICUS CURIAE*[1]

The Washington Legal Foundation (WLF) is a public interest law firm and policy center with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, a limited, accountable government, and the rule of law. As part of its ongoing Business Civil Liberties Project, WLF has regularly appeared as *amicus curiae* before this Court and numerous other federal and state courts in cases addressing the proper scope of criminal prosecutions against members of the business community. *See, e.g., Stolt-Nielsen S.A. v. United States*, *cert. denied*, 549 U.S. 1015 (2006); *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005); *Friedman v. Sebelius*, 686 F. 3d 813 (D.C. Cir. 2012).

In addition, WLF's Legal Studies Division, the publishing arm of WLF, frequently publishes articles and sponsors media briefings on the problem of overcriminalization—the growing trend at the federal level to criminalize normal business activities. *See, e.g.*, Wash. Legal Found., *Special Report: Federal Erosion of Business Civil Liberties* (2nd. ed., 2010); Sarah Hody & Martin Kwedar, *Stock-Option Backdating Cases Reflect Costs of Over-criminalization*, WLF LEGAL BACKGROUNDER (July

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief; letters of consent have been lodged with the Clerk.

23, 2010); J. Brady Dugan & Mark J. Botti, *Honest Services Fraud and Antitrust: Will the Supreme Court Re-Write the Rules for "Competition Crimes"?*, WLF LEGAL BACKGROUNDER (Dec. 11, 2009).

Because vague, ambiguous language in a criminal statute often deprives law-abiding citizens of the appropriate "fair warning" needed to comply with the law, this Court has repeatedly held that individual criminal defendants are entitled to know what conduct the law forbids and what the likely punishment for that conduct will be. WLF fears that the Eleventh Circuit's overly broad interpretation of the Sarbanes-Oxley Act's "anti-shredding" provision will radically transform the law into a trap for the unwary. Moreover, because that broad interpretation provides inadequate guidance to law enforcement agents and prosecutors, the holding below invites arbitrary and discriminatory application of federal law.

The statute at issue here, 18 U.S.C. § 1519, exhibits at least three aspects of overcriminalization that concern WLF. First, the statute criminalizes ambiguous conduct without providing a workable definition or meaningful limitation to the phrase "tangible object." Second, as applied, the statute extends criminal law into economic activity that could best be addressed with regulatory or civil enforcement—and in fact was already adequately addressed by civil enforcement three years before criminal charges were ever filed. Finally, Congress drafted the statute to apply to the investigation of financial and other white collar crimes where the preservation of records, documents, or similar tangible objects (such as receipts or bills of lading) is

crucial to prove wrongdoing. By construing § 1519 to apply well outside the narrow category of conduct to which Congress addressed it, the holding below creates a duplicative and overlapping statute that criminalizes activity addressed more specifically in other parts of federal law governing, in this case, commercial fishing. Taken together, these facets of overcriminalization deprived Mr. Yates of fair notice that his alleged conduct fell within the statute's purview.

WLF has no direct interest, financial or otherwise, in the outcome of this case. Because of its lack of a direct interest, WLF believes that it can provide the Court with a perspective that is distinct from that of the parties. As *amicus curiae*, WLF believes that the arguments set forth in this brief will assist the Court in evaluating the issues presented by the Petition.

STATEMENT OF THE CASE

Petitioner John Yates is a commercial fisherman who harvests fish off the west coast of Florida in the Gulf of Mexico. *See* Pet. App. A2. On August 23, 2007, John Jones, a field officer with the Florida Fish and Wildlife Conservation Commission (FWC) who is deputized by the National Marine Fisheries Service to enforce federal fisheries law, observed Yates engaged in commercial fish harvesting. *Id.* Officer Jones approached and boarded the vessel, the *Miss Katie*, to inspect for gear, fishery, and boating-safety compliance. *Id.*

Once aboard the *Miss Katie*, officer Jones proceeded to measure Yates's red grouper harvest to

determine whether the fish met the minimum legal length 20 inches. Pet. App. A3. Having determined that 72 grouper were too short, Jones issued Yates a citation for the undersized fish. *Id.* It was subsequently alleged that, before returning to port, Yates ordered members of his crew to throw undersized fish overboard because, upon re-measuring the fish four days later on August 27, 2007, FWC officers determined that only 69 fish measured less than 20 inches. *Id.* at A4.

In 2010, three years after Mr. Yates received his civil citation, the U.S. Attorney for the Middle District of Florida charged him with, *inter alia*, violating the "anti-shredding" provision of the Sarbanes-Oxley Act, 18 U.S.C. § 1519, which makes it a crime punishable up to twenty years in prison to knowingly destroy, conceal, or cover up "any record, document, or tangible object" with the intent to impede or obstruct an investigation. *See* Pet. App. A6. Yates contended that the fish he harvested from the Gulf of Mexico were not undersized and that FWC officers had failed to measure them in accordance with federal law, which requires that fish be measured with their mouths open so as to produce the greatest overall length. *Id.* at A4-A5.

At trial, Yates twice moved for a judgment of acquittal, once upon the conclusion of the government's case-in-chief and again at the close of all evidence, on the grounds that § 1519 is "a records-keeping statute aimed solely at destruction of records and documents," Pet. at 5, and did not apply to the alleged destruction of fish. Although he initially questioned whether fish properly came within the meaning of "tangible object," the district

judge denied both motions. Pet. App. A6. Concluding that a "tangible object" under § 1519 was not limited to records or documents, the district court opined:

> Given the nature of the matters within the jurisdiction of the government agency involved in this case, and the broad language of § 1519, the Court finds that a reasonable jury could determine that a person who throws or causes to be thrown fish overboard in the circumstances of this case is in violation of § 1519.

Id. at B1-B2. The jury ultimately found Yates guilty of violating § 1519, and the district court sentenced him to 30 days in prison and three years of supervised release.

On appeal, the Eleventh Circuit affirmed. Devoting only two perfunctory paragraphs to the statutory interpretation issue, the appeals court held that a fish is a "tangible object" within the meaning of § 1519. In reaching that conclusion, the appeals court relied entirely on Black's Law Dictionary, which defines the word "tangible" as "having or possessing physical form." Pet. App. A10. Because a fish possesses a physical form, the appeals court reasoned, § 1519 "unambiguously applies to fish." *Id.*

SUMMARY OF ARGUMENT

The Sarbanes-Oxley Act of 2002 sought to restore the integrity of public companies' disclosure and accounting practices in the wake of corporate scandals such as Enron and WorldCom. Among other provisions designed to hold public companies

more accountable, § 1519—known as the "anti-shredding" provision—makes it a crime punishable up to twenty years in prison to knowingly destroy, conceal, or cover up "any record, document, or tangible object" with the intent to impede or obstruct an investigation.

Three years after receiving an administrative citation for harvesting undersized fish in the Gulf of Mexico, Petitioner, a commercial fisherman, was indicted under § 1519 for, of all things, allegedly ordering members of his crew to throw undersized fish overboard. The indictment alleged that, by causing undersized red grouper to be thrown overboard, Petitioner had in fact destroyed, concealed, or covered up a "tangible object" within the meaning of the Sarbanes-Oxley Act's anti-shredding provision. At the time of Petitioner's arrest, no court in the country had interpreted § 1519 in such a way as to cover Petitioner's alleged conduct.

This Court has interpreted the Due Process Clause to require that criminal statutes put the world on notice, in words with sufficient definiteness that ordinary people can understand, of what conduct is prohibited. This void-for-vagueness doctrine has two concerns: providing fair warning to potential violators and cabining the discretion of police, prosecutors, and juries. To survive a constitutional challenge, a statute must (1) describe with sufficient particularity what a suspect must do in order to satisfy the statute and (2) establish minimal guidelines to govern prosecution and enforcement. Section 1519 does neither.

Construed by the Eleventh Circuit to include the destruction or concealment of practically *anything* that possesses a "physical form," § 1519's "tangible object" provision is too indefinite to establish an "ascertainable standard of guilt" under this Court's binding precedent and is thus void for vagueness. Likewise, the Eleventh Circuit's open-ended interpretation of § 1519 imposes no limits or standards on when prosecution may be warranted, but rather invites arbitrary enforcement by federal prosecutors and law enforcement.

Finally, even if the Eleventh Circuit's elastic construction of § 1519 is valid for future convictions, due process precludes retroactively applying such a "novel construction" in this case where it would expand the scope of conduct subject to prosecution. At the time of Petitioner's arrest, he had no indication that the disposal of allegedly undersized fish constituted the destruction of a "record, document, or tangible object" under federal law. No other federal appeals court had so ruled, nor had any court opined on the proper construction of "tangible object" as used in § 1519. In light of the Eleventh Circuit's novel and unexpected construction of the Sarbanes-Oxley Act, Mr. Yates cannot be criminally punished for the alleged disposal of undersized fish in the Gulf of Mexico. The decision below should be reversed.

ARGUMENT

I. Section 1519 Failed to Give Mr. Yates "Fair Warning" That His Alleged Conduct Was Prohibited

This Court has long understood that "the dividing line between what is lawful and unlawful cannot be left to conjecture." *Connally v. General Constr. Co.*, 269 U.S. 385, 393 (1926). To the contrary, the constitutional right of due process guarantees that no person should be forced "to speculate as to the meaning of penal statutes." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). Living under the rule of law means that citizens "are entitled to be informed as to what the State commands or forbids." *Id.* Because "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed," every law must "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States v. Harriss*, 347 U.S. 612, 617 (1954).

Due process thus requires that a criminal statute give a defendant "fair warning" of what conduct is prohibited. "Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States*, 283 U.S. 25, 27 (1931). Accordingly, criminal laws must "employ[] words or phrases having a technical or other special meaning, well enough known to enable those within

their reach to correctly apply them, or a well-settled common-law meaning, notwithstanding an element of degree in which the definition as to which estimates might differ." *Connally*, 269 U.S. at 391 (citations omitted).

This Court analyzes fair-warning challenges to criminal laws under the "void-for-vagueness" doctrine. Under that framework, "the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *Id.* Except where First Amendment rights are involved, vagueness challenges must be evaluated in light of the facts of the case at hand. *United States v. Mazurie*, 419 U.S. 544, 550 (1975). The fair warning component of the vagueness doctrine focuses on fairness to the targeted individual. To survive a constitutional challenge, a statute must "describe with sufficient particularity what a suspect must do in order to satisfy the statute." *Kolender v. Lawson*, 461 U.S. 352, 361 (1983).

A statute that fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited," *id.* at 357, or fails to "establish minimal guidelines to govern law enforcement," *id.* at 358 (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)), is unconstitutionally vague. Here, 18 U.S.C. § 1519, which makes it a crime punishable up to twenty years in prison to knowingly destroy, conceal, or cover up "any record, document, *or tangible object*," fails both of these tests when applied to Mr. Yates's conduct in this case.

Mr. Yates did not have fair warning of "what the law intend[ed] to do if a certain line [was] passed." *McBoyle*, 283 U.S. at 27. The legislative history reveals that § 1519 was enacted by Congress to be a "general anti-shredding provision" prohibiting people from "destroying, altering, or falsifying documents." 148 Cong. Rec. at S7419 (July 26, 2002). Of course, the provision is part of the Sarbanes-Oxley Act, a federal law enacted "[t]o protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws." Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002). Section 1519 forms part of § 802, which is titled "Criminal Penalties for Altering Documents." *Id.* Section 1519 itself is titled "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy." 18 U.S.C. § 1519.

The statute does not define "tangible object," and it leaves unanswered many questions about that elastic phrase. Nor does the phrase "tangible object" have a settled common-law meaning on which Congress could have relied in drafting the statute. There might not be a vagueness problem if "tangible object" were otherwise well defined—that is, if the phrase enjoys an ordinary and natural meaning that is commonly understood. But it does not. And although the Eleventh Circuit relied exclusively on Black's Law Dictionary's definition of "tangible" to supply a meaning in this case, the fair warning principle ensures that a person should be able to "conform [his] conduct to law by reading the *face* of a statute—not by having to appeal to outside legal

materials." *Sabetti v. DiPaolo*, 16 F.3d 16, 17 (1st Cir. 1994) (emphasis in original) (Breyer, J.).

In *McBoyle v. United States*, a case involving the permissible statutory reach of the National Motor Vehicle Theft Act, this Court cautioned that "[w]hen a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon the speculation that if the legislature had thought of it, very likely broader words would have been used." 283 U.S. at 27. So too here, and because § 1519 is laid down in words that evoke in the common mind only "records" and "documents," the statute should not be extended to include fish simply because it may seem to the Eleventh Circuit that a similar policy applies.

Construed by the Eleventh Circuit to include the destruction or concealment of practically *anything* that possesses a "physical form," § 1519's "tangible object" provision is too indefinite to establish an "ascertainable standard of guilt" under this Court's binding precedent and is thus void for vagueness. *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921). Accordingly, the holding of the Eleventh Circuit should be reversed.

II. As Interpreted by the Eleventh Circuit, Section 1519 is Subject to Arbitrary and Discriminatory Enforcement

The panel's construction of § 1519 also fails the "more important" due process requirement for

criminal statutes, "the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolender*, 461 U.S. at 358 (quoting *Smith*, 415 U.S. at 574). This requirement arises not from the lack of notice § 1519 provides a potential offender, but from the unfettered discretion it places in the hands of federal prosecutors and law enforcement personnel.

If criminal statutes are impermissibly vague or indefinite, law enforcement will not be guided by clear standards in enforcing those statutes. Such imprecision gives police and prosecutors leverage to make unfair demands of defendants, to threaten defendants with severe punishment for relatively minor infractions, or to exploit their positions of authority for improper motives. Indeed, a vague statute "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

Because they are enforced in such an ad hoc and subjective manner, vague laws also give government officials "the *de facto* power of determining what the criminal law in action shall be." Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 Law & Contemp. Probs. 401, 428 (1958). In a famous passage in *The Spirit of the Laws*, Montesquieu asserted that separation of legislative and executive functions is vital to preventing "tyrannical" enforcement of tyrannical laws: "When the legislative and executive powers are united in the same person, or in the same body of magistrates,

there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to enact them in a tyrannical manner." Montesquieu, *The Spirit of the Laws* 163 (J.V. Pritchard ed., Thomas Nugent trans., 1914) (1748).[2] More than 70 years ago, Justice Robert Jackson cautioned:

> If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone.

Robert H. Jackson, *The Federal Prosecutor*, 31 Am. Inst. of Crim. L. & Criminology 3, 5 (1941). As this Court cautioned more than a century ago, "[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *United States v. Reese*, 92 U.S. 214, 221 (1876).

If arbitrary and discriminatory enforcement is

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[2] Vaguely worded statutes thus raise separation-of-powers concerns under the nondelegation doctrine. If the executive branch is permitted, in effect, to re-write the law at the point of enforcement, then Congress will have abdicated its supreme policy-making role.

to be avoided, "laws must apply explicit standards for those who apply them." *Grayned*, 408 U.S. at 108. Otherwise, if the legislature fails to provide such minimal guidelines, "a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender*, 461 U.S. at 358 (quoting *Smith*, 415 U.S. at 575).

In *Kolender*, the statute at issue required suspects to provide "credible and reliable" identification to police and to "account for their presence when requested by a peace officer under circumstances that would justify a stop under the standards of *Terry v. Ohio*." *Id.* at 353. The Court struck down that statute because it "vest[ed] virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest." *Id.* at 358. The statute thus "furnishe[d] a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." *Id.* at 360 (quotations omitted).

Similarly, the Eleventh Circuit's open-ended interpretation of § 1519 imposes no limits or standards on when prosecution may be warranted. This lack of guidance is especially troubling given that violation of the statute permits a maximum penalty of 20 years in prison. The statute's failure to cabin prosecutorial discretion regarding what constitutes destruction of a "record, document, or tangible object" is starkly illustrated by the instant case, in which a commercial fisherman who allegedly

caused undersized fish to be thrown overboard is deemed a criminal under an obscure statutory provision entitled "Destruction, alteration, or falsification *of records* in Federal investigations and bankruptcy." 18 U.S.C. § 1519 (emphasis added).

As interpreted by the Eleventh Circuit, § 1519 invites abuse by enforcement agencies—not only law enforcement, but as Justice Jackson warned, by government prosecutors. If the holding below is allowed to stand, arbitrary and discriminatory enforcement will continue. Because the Eleventh Circuit's indefinite construction of § 1519 subjects Mr. Yates to criminal liability "under a standard so indefinite that police, court, and jury were free to react to nothing more than their own preferences," *Smith*, 415 U.S. at 578, the holding below should be reversed.

III. The Appeals Court's Unexpected and Novel Construction of Section 1519 Operates With Impermissible *Ex Post Facto* Effect

"[L]imitations on *ex post facto* decisionmaking are inherent in the notion of due process." *Rogers v. Tennessee*, 532 U.S. 451, 456 (2001). Even if the Eleventh Circuit's elastic construction of § 1519 is valid for the future, due process precludes such a "novel construction" if it would expand the scope of conduct subject to prosecution in this case, where "neither the statute nor any prior judicial decision ha[d] fairly disclosed [the defendant's conduct] to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266 (1997). This is such a case.

When a federal court construes a statute, it "explain[s] its understanding of what the statute has meant continuously since the date when it became law." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994). Consequently, "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law." *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964). This Court has squarely held that "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *Lanier*, 520 U.S. at 266.

Once a court interprets a statute so as to render a defendant's conduct criminal, it may not apply that interpretation retroactively against that defendant unless "the statute, either standing alone or as construed, made it reasonably clear *at the relevant time* that the defendant's conduct was criminal." *Lanier*, 520 U.S. at 267 (emphasis added). This formulation provides courts with the needed flexibility to ensure that the law may evolve, *see Rogers*, 532 U.S. at 462, while ensuring fundamental fairness by requiring that the prosecution and punishment of particular conduct is foreseeable. A judicial ruling that is both unexpected and novel deprives a criminal defendant of those important protections.

"Unlike the void-for-vagueness doctrine and the rule of lenity, this rule of nonretroactivity is not a rule of statutory interpretation." Trevor W. Morrison, *Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes*, 745 Cal.

L.R. 455, 469 (2001). Rather, it provides that "once a court has decided to interpret a statute a certain way, the court may not apply that interpretation retroactively if the text of the statute, or prior constructions of it, did not fairly disclose the possibility that the statute could be read that way." *Id.*

At the time of Mr. Yates's alleged offense, the law did not give him fair notice that the disposal of allegedly undersized fish constituted the destruction of a "record, document, or tangible object" under the Sarbanes-Oxley Act. No other federal appeals court had so ruled, nor had any court ruled on the proper construction of "tangible object" as used in § 1519. Only later in this case, when the Eleventh Circuit expanded § 1519 to cover the destruction of anything "having or possessing a physical form," was Mr. Yates's conduct criminalized for the first time. But in reaching that conclusion, the panel cited no applicable precedent interpreting § 1519 to support its construction, relying instead on Black's Law Dictionary's definition of "tangible." The panel did cite *United States v. Sullivan*, 578 F.2d 121, 124 (5th Cir. 1978), a case noting that cocaine is a "tangible object" subject to examination and inspection under Rule16(a) of the Rules of Criminal Procedure. But that case was decided more than two decades before enactment of the Sarbanes-Oxley Act and has nothing to do with Sarbanes-Oxley or § 1519.

Under this Court's retroactivity analysis, criminal liability may be imposed "if, but only if, 'in light of the pre-existing law the unlawfulness [of the conduct in question was] apparent.'" *Lanier*, 520 U.S. at 271-72 (quoting *Anderson v. Creighton*, 483

U.S. 635, 640 (1987)). In cases of first impression such as this one, due process precludes criminal liability. In light of the Eleventh Circuit's novel and unexpected construction of the Sarbanes-Oxley Act, Mr. Yates cannot be criminally punished for the alleged disposal of undersized fish in the Gulf of Mexico. The decision below should be reversed.

CONCLUSION

For the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully requests that the Court reverse the Eleventh Circuit and hold that § 1519 of the Sarbanes-Oxley Act is void for vagueness.

Respectfully submitted,

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